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DONALD A. BURR
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OF COUNSEL

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ANN C. LIBURD
JOHN C. SIEMERS
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MICHAEL W. SEVILLE
DAVID W. PEASE
THOMAS P. OWENS III
JOYCE WEAVER JOHNSON
NORA G. BARLOW

810 N STREET
ANCHORAGE, ALASKA 99501-3293
TELEPHONE: (907) 276-8100
FACSIMILE III: (907) 258-2530

TAX ID NO. 92-0037399

September 17, 1993

Representative Brian Porter
716 West Fourth Avenue, #640
Anchorage, AK 99501

HAND DELIVERED

Re: Uniform Fraudulent Transfer Act

Dear Representative Porter:

As promised in our telephone conversation today, I am forwarding two copies of the 1984 Uniform Fraudulent Transfer Act (UFTA) drafted by the National Conference of Commissioners on Uniform State Laws, two copies of Alaska's present law concerning fraudulent transfers, and a copy of a Department of Law Memorandum concerning the UFTA. Also enclosed are copies of a map and a chart from the Uniform Law Commission showing the 30 states which already have adopted the UFTA.

The heart of the UFTA is in section 4, which covers and augments the ground covered by existing Alaska Statutes 34.40.010. Section 4(a)(2) of the UFTA would eliminate the present Alaskan necessity of finding actual intent by a property transferor to hinder, delay or defraud a creditor in many situations where the transferor is obviously transferring assets solely to keep them out of the reach of the transferor's creditors.

Several Uniform Law Commissioners from Alaska agree with me that you are an ideal person to sponsor enactment of the UFTA in Alaska because of your related law enforcement and business background and because the legislation is desirable from the standpoint of legitimate business people and will cost the State of Alaska nothing. In fact, it is certain to help the State of Alaska loan programs in dealing with unscrupulous borrowers. When you return to Anchorage, I would appreciate having the opportunity to review the UFTA further with you.

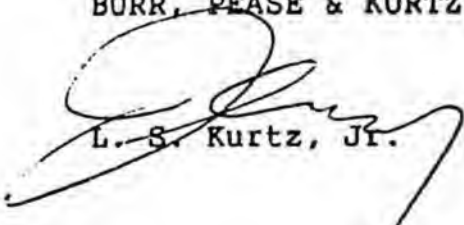
Representative Brian Porter
September 17, 1993
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In closing, the only parties I am representing in connection with this matter are the commissioners appointed by the State of Alaska to the Uniform Law Commission and myself. I have represented numerous parties (both debtors and creditors) in situations involving fraudulent or allegedly fraudulent transfers, and I am convinced the UFTA should be enacted in Alaska. Our present law technically was adopted in 1949 as noted in the Department of Law Memorandum, but the substance of it goes back to May 17, 1884, when the civil laws of Oregon were put in place in the State of Alaska. Looking back at Alaska Compiled Laws of 1949, 1933, and 1913, and Carter's Annotated Alaska Codes of 1900, I find no substantive changes in this area of law since the Oregon laws were installed here.

Please call me when you have had a chance to review these materials. Thank you for your time on the telephone today.

Sincerely,

BURR, PEASE & KURTZ



L. S. Kurtz, Jr.

dms
Enclosures as noted.

STATE OF ALASKA

LSK

DEPARTMENT OF LAW

RECEIVED

OFFICE OF THE ATTORNEY GENERAL

AUG 30 1993

BURR, PEASE & KURTZ

August 26, 1993

WALTER J. HICKEL, GOVERNOR

REPLY TO:

- 1031 W 4th AVENUE SUITE 200
ANCHORAGE, ALASKA 99501-1994
PHONE: (907) 278-3550
FAX: (907) 278-3697
- KEY BANK BUILDING
100 CUSHMAN ST. SUITE 400
FAIRBANKS, ALASKA 99701-4679
PHONE: (907) 452-1568
FAX: (907) 456-1317
- P.O. BOX ¹¹⁰³⁰⁰ 8 - STATE CAPITOL
JUNEAU, ALASKA 99811-0300
PHONE: (907) 465-3600
FAX: (907) ~~465-6295~~
465-6735

Lloyd S. Kurtz, Jr., Esq.
Burr, Pease & Kurtz
810 N Street
Anchorage, Alaska 99501

NO DOCKET DATE *uf*
DOCKETED

Dear Jerry:

At my request, Assistant Attorney General Mary Ellen Beardsley reviewed the Uniform Fraudulent Transfer Act (UFTA). Ms. Beardsley has a background in tax and bankruptcy law. She concludes that UFTA would be an improvement over existing Alaska law.

I thought that all of the Alaska Uniform Law Commissioners might want to review her memorandum in advance of our September teleconference.

Sincerely,

CHARLES E. COLE
ATTORNEY GENERAL

By: *Deborah E. Behr*
Deborah E. Behr
Assistant Attorney General

DEB:cl

MEMORANDUM

RECEIVED

AUG 30 1993

State of Alaska

Department of Law

TO Deborah Behr
Assistant Attorney General
Legislation/Regulation Section

BURR, PEASE & KURTZ
DATE

August 24, 1993

FILE NO

TEL NO

269-5201

SUBJECT

UFTA

RECEIVED

Department of Law

AM 3 25 1993 PM
7,8,9,10,11,12,1,2,3,4,5,6

FROM

Mary Ellen Beardsley *MEB*
Assistant Attorney General
Commercial Section-Anchorage

You have asked me to comment on the Uniform Fraudulent Transfer Act ("UFTA"), and whether it might be beneficial for Alaska to adopt the UFTA. After reviewing the material you provided as well as AS 34.40.010 - .130, Alaska's fraudulent conveyances statute, and the headnotes of cases dealing with fraudulent conveyances in Alaska, I conclude that the UFTA would be an improvement over Alaska's existing law.

As noted in Summers v. Hagen, ___ P.2d ___, No. 3961, May 28, 1993, at fn. 5 pg. 8, Alaska has not adopted the predecessor to the UFTA, the Uniform Fraudulent Conveyance Act ("UFCA"). Alaska's law was adopted in 1949, and has seen very little change since its adoption. However, since 1949, many changes in both state and federal law have occurred, particularly in the area of bankruptcy, and relationships between creditors and debtors have become more complex. Debtors, in particular, have found new and more imaginative ways of hiding assets from their creditors.

The Alaska law provides in general that a conveyance, whether in writing or otherwise, of real or personal property will be void if it was made "with the intent to hinder, delay or defraud creditors." (Emphasis added) AS 34.40.010. The cases cited under this statute (as well as AS 34.40.090) indicate that the existence of this fraudulent intent is a question of fact, that the court will never presume fraud and that the burden of proof is upon the plaintiff. This burden of proof can be extremely hard to prove. The only exception to this is found in AS 09.25.060 which creates a prima facie presumption of fraud when personal property is sold and the vendee does not take immediate delivery and does not have continued possession.

The UFTA, on the other hand, not only considers a transfer fraudulent if the debtor made the transfer with the intent to hinder, delay, or defraud any creditor (whether present or future), but, in certain cases, it mandates that the intent exists if the facts are as stated in the UFTA. The UFTA also sets out numerous non-exclusive factors to be considered by the court when

Deborah Behr
Assistant Attorney General
Legislation/Regulation Section

August 24, 1993
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determining if the debtor had "actual intent." Proof of several of these factors will be strong evidence of the debtor's intent. The Court in Summers requires the plaintiff to establish "the specific intent of each participant in the scheme to hinder, delay or defraud." (Emphasis added) Id., at 8. Under the UFTA, the transferee's intent does not appear to be a factor in determining whether the transfer was fraudulent. In addition, when determining if adequate consideration was exchanged, the transferee's good faith is irrelevant. Finally, another important distinction is that under the UFTA a transfer to an "insider" will be considered per se fraudulent if the debtor was insolvent at the time and the "insider" had reason to believe that the debtor was insolvent.

Cases under the Alaska law also hold that an insolvent debtor may convey all or some of his property to one creditor and the conveyance will not be considered fraudulent. It is not improper nor unlawful to give preference to one creditor.

The UFTA differs substantially from the Alaska law for it considers as one of the badges of fraud the fact that the debtor was insolvent at the time of the transfer or that he became insolvent as a result of the transfer. The UFTA defines insolvency and even establishes a rebuttable presumption of insolvency if the debtor is not paying his debts as they become due.

The UFTA clearly outlines the remedies available to creditors, including attachment, injunctive relief, appointment of a receiver, or even execution against the property if the creditor's claim has been reduced to a judgment. The UFTA makes no distinction between whether the creditors' claims have matured or not. On the hand, the Court in Summers, Id., at fn. 6, pg. 9, indicated that general creditors will have a cause of action but they "must reduce their claims to judgments before asserting this cause of action. Prior to judgment, general creditors have no legal right to the property fraudulently conveyed."

Finally, Alaska law does not address the statute of limitations as to when a fraudulent conveyance action will be precluded. AS 09.10.070 establishes a two year statute of limitations for all tort actions, which is what a fraudulent conveyance would fall under. The UFTA specifically establishes statutes of limitations and sets out when the time period begins to run depending on which section of the UFTA the action is being brought under.

I have attempted to outline some of the differences between the UFTA and Alaska law. In conclusion, the UFTA is a modernization of the UFCA and incorporates the many changes which

Deborah Behr
Assistant Attorney General
Legislation/Regulation Section

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have occurred over time in the area of fraudulent transfers. It conforms state law with applicable federal law (in particular, bankruptcy law) and overcomes potential problems that could arise because of the 5th Circuit case of Durrett v. Washington National Insurance Co., 621 F.2d 201 (5th Cir. 1980). It also eases the burden of proof upon the plaintiff slightly and places some responsibility upon the debtor to show why the transfer should not be voided. It may also make it more difficult for debtors to successfully hide or transfer their assets as a means of becoming judgment proof.

I hope this memo regarding the UFTA is of some assistance to you. If I can be of further assistance, please do not hesitate to contact me.

MEB:amh

THE UNIFORM FRAUDULENT TRANSFER ACT

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- * Summary of the Uniform Fraudulent Transfer Act
- * "Why states should adopt the Uniform Fraudulent Transfer Act."
- * "An analysis of the Uniform Fraudulent Transfer Act," by Fred Miller, Professor of Law at the University of Oklahoma.
- * "A Short Comparison of the Uniform Fraudulent Transfer Act with the Uniform Fraudulent Conveyance Act."
- * "Durrett, the Uniform Fraudulent Transfer Act, and Federal Bankruptcy Law."
- * A Tradition of Excellence - a history of the Uniform Law Commissioners
- * Uniform State Laws - how a uniform act is created

A Few Facts About

THE UNIFORM FRAUDULENT TRANSFER ACT

PURPOSE: Providing a creditor with the capacity to procure assets a debtor has transferred to another person to keep them from being used to satisfy the debt.

ORIGIN: The Uniform Fraudulent Transfer Act, completed by the Uniform Law Commissioners in 1984, revises the Uniform Fraudulent Conveyance Act of 1918.

ENDORSED BY: American Bar Association

STATE	Alabama	Maine	Ohio
ADOPTIONS:	Arizona	Minnesota	Oklahoma
	Arkansas	Missouri	Oregon
	California	Montana	Rhode Island
	Colorado	Nebraska	South Dakota
	Connecticut	Nevada	Texas
	Florida	New Hampshire	Utah
	Hawaii	New Jersey	Washington
	Idaho	New Mexico	West Virginia
	Illinois	North Dakota	Wisconsin

1993
INTRODUCTIONS: Virginia

For any further information regarding the Uniform Fraudulent Transfer Act, please contact John McCabe or Katie Robinson at 312-915-0195.

(4/15/93)

WHY STATES SHOULD ADOPT
THE UNIFORM FRAUDULENT TRANSFER ACT

Are we only as good as the extent to which we honor our obligations? Many would argue for this proposition. And when our obligations are financial, the argument is reinforced by law. It is to this proposition that the Uniform Fraudulent Transfer Act is addressed. If we have acquired debt we should not be able to manipulate our assets so that creditors will be deprived of their value when we default on our debt. We should not be able to plan an artificial insolvency by transferring assets to others against the interests of our creditors.

The Uniform Fraudulent Transfer Act works as a deterrent, preventing such transgressions against obligations incurred, and provides creditors with a remedy when debtors transfer or hide assets that would otherwise be available to satisfy legitimate debts.

While the issue of obligation is preeminent, the economic issue is no less important. Credit is essential to the economic life of this country. Consumer credit, commercial credit, secured and unsecured credit enter into our lives, everyday. Credit remains available so long as those who extend it are given certain assurances about their rights at default. The Uniform Fraudulent Transfer Act provides assurances to creditors that help make credit available to all of us.

This economic issue leads directly to the issue of uniformity. The availability and the health of the credit mechanism require national standards. The principles of the old Uniform Fraudulent Conveyance Act became applicable to every person in every state because it was incorporated into the Federal Bankruptcy Act. Much of what is in the newer Fraudulent Transfer Act duplicates the Bankruptcy Reform Act of 1978. Uniformity has become not only a question of law between states, but also between state and federal law. Without uniformity, credit becomes less available, and the credit mechanism is less reliable. To avoid confusion and expense, the same rules must apply throughout the country. Public expectations are the same in every state and jurisdiction.

Associated with the issue of uniformity is the issue of modernity. The original Fraudulent Conveyance Act, which the Fraudulent Transfer Act replaces, was promulgated in 1918. Changes in federal bankruptcy law, in creditor-debtor relations in general, even in the rules governing the conduct of lawyers, make it clear that a modernization is overdue. The Uniform Fraudulent Transfers Act answers that immediate need.

UNIFORM FRAUDULENT TRANSFER ACT

When we say a person "owns" something, we tend to think in all or nothing terms. Whatever a person owns is at that person's disposal - to sell, to give, to abandon, or to pledge as security for a debt. But relationships between people over property are never so simple or so unqualified. A creditor-debtor relationship, for example, may materially change an owner's power over the property owned. A mortgage, clearly, restricts what an owner may do with mortgaged real estate. The creditor has legally protected rights in the real estate securing the debt. Under Article 9 of the Uniform Commercial Code, secured creditors, also, obtain rights in collateral that are protected.

A less clear category, but important to the maintenance of credit, is that of the unsecured creditor-debtor relationship in which the debtor manipulates property to defeat the creditor's interest solely for that purpose and for no other. Perhaps the debtor foresees insolvency and tries to conceal property that a creditor might use to satisfy the debt. Perhaps the debtor never intends to satisfy the debt and manipulates property to make himself judgment-proof. Should the creditor be without recourse, and should the debtor's rights to deal with property be unrestricted in these kinds of cases?

The National Conference of Commissioners on Uniform State Laws (ULC) proposed the Uniform Fraudulent Conveyance Act (UFCA) in 1918 as an answer to that question. It was created to supersede the Statute of 13 Elizabeth which was enacted in some form by many states, and which introduced the concept of the fraudulent conveyance into the law of every American jurisdiction, with or without enactment. The UFCA was adopted in twenty-six states, and its provisions were incorporated into the Federal Bankruptcy Act.

In 1984, this 1918 Act was revised and renamed the Uniform Fraudulent Transfer Act (UFTA). The intent of the UFTA is the same as the UFCA - it classifies a category of transfers as fraudulent to creditors and provides creditors with a remedy for such transfers. The fundamental remedy is the recovery of the property for the creditor. Why a new Act at this time? The terminology of the UFCA had become considerably archaic, and needed to be modernized. The Bankruptcy Reform Act of 1978 changed the federal law on fraudulent transfers in significant ways, and made it imperative to reconsider state law. And creditor-debtor relationships have changed and become more complicated, so that the whole issue of fraudulent transfers needed rethinking. In 1984, the UFTA is ready to promote the modernization of this subject area of law.

UFTA creates a right of action for any creditor against any debtor and any other person who has received property from the debtor in a fraudulent transfer. A fraudulent transfer occurs when a debtor intends to hinder, delay, or defraud a creditor, or transfers property under certain conditions to another person without receiving reasonably equivalent value in return. But not all such transfers are fraudulent to every creditor.

UFTA distinguishes between present and future creditors, and specifies the kinds of transfers that are fraudulent to each of the two categories of creditors. Both present and future creditors may recover property when there is a transfer with intent to defraud. Both may recover when a transfer is made without receiving reasonably equivalent value when the result is to make the debtor's assets unreasonably small in relation to the business or transaction in which the debtor is engaged or about to be engaged. Also, present and future creditors can both recover when a debtor transfers property without receiving reasonably equivalent value when intending to incur debts beyond the ability to pay.

Present creditors, however, can recover property when it is transferred by a debtor to another person without receiving reasonably equivalent value if the debtor is insolvent or becomes insolvent as a result of the transfer. A transfer to an "insider" without receiving reasonably equivalent value when the debtor is insolvent, is also fraudulent to present creditors. The term "insider" is defined, and is someone with a special relationship to the debtor. Examples are relatives or business partners (when the debtor is a partner). To be liable, an "insider" must have reasonable cause to believe that the debtor is insolvent.

The fundamental relief for a creditor when there is a fraudulent transfer is recovery of the property from the person to whom it has been transferred. UFTA allows "avoidance of the transfer or obligation to the extent necessary to satisfy the creditor's claim...." Whatever is necessary to obtain the property is provided for, including attachment, injunctive relief, appointment of a receiver, or "any other relief the circumstances may require." If the creditor has reduced the claim to a judgment, the court may levy execution against the recovered assets. This means that the property can be sold to satisfy the amount of the judgment.

Much of the UFTA resembles the UFCA, its predecessor. What, then, are some of the differences? (A more detailed comparison is available from the ULC.) To begin with, the term "transfer" taken from the Federal Bankruptcy Act replaces the term "conveyance." UFCA uses the term "fair consideration" instead of "reasonably equivalent value." "Reasonably equivalent value" does not include the element of good faith as "fair consideration" does, and is more sharply defined than "fair consideration" is in the UFCA. UFTA overcomes the problem raised in the case of

Durrett v. Washington National Insurance Co., 621 F.2d 201 (5th Cir. 1980), a case that jeopardized mortgage foreclosure sales. Under UFTA, a properly conducted foreclosure sale is not a fraudulent transfer, notwithstanding the fact that it does not recover an amount somewhat near the actual market value of the property. The concept of the "insider" is new in the UFTA. UFTA provides for defenses of transferees and for a statute of limitations. Both issues are not addressed in the UFCA.

The Uniform Fraudulent Transfer Act continues the concept of a civil action for transfers fraudulent to creditors first created in the Statute of 13 Elizabeth, and comprehensively continued in the Uniform Fraudulent Conveyance Act. The new Act takes into account the considerable development in both law and practice in creditor-debtor relationships since 1918. The ULC hopes that it will be adopted uniformly in all states.

THE UNIFORM FRAUDULENT TRANSFER ACT

by

FRED H. MILLER
Professor of Law at the University of Oklahoma

Section by Section Analysis of the Act

Section 1 contains definitions. Section 2 also contains the definition of "insolvent," and Section 3 the definition of "value." The definition of "asset" in Section 2(2), together with the latter definitions of "insolvent" and "value," in a general sense formulate the core concept of the act: the transfer of an asset (or incurring an obligation) for inadequate value by an insolvent debtor or one rendered insolvent by the transaction is a fraudulent transfer. Subsection 3(B) is worth particular note in this respect because it overrules for state law the controversial holding in Durrett v. Washington Nat. Ins. Co., 621 F.2d 201 (5th Cir. 1980), that a regularly conducted mortgage foreclosure that produces a price "too low" may be avoided as a fraudulent conveyance. By clouding property titles the Durrett rule virtually is a self-fulfilling prophecy.

Section 4 Subsection a(1) states the basic rule of the act: a transfer made or an obligation incurred with actual intent to hinder, delay or defraud creditors is actionable by creditors. How does a creditor prove the debtor's actual intent? Subsection b sets out "badges of fraud" if several of these appear it is strong evidence. Subsection a(2), on the other hand, sets out two cases where the law decrees the intent exists if the facts are as stated.

Section 5 states two further cases where the law decrees the transaction is fraudulent, but only as to present creditors and not also as to creditors arising later as is the case for transfers covered by Section 5.

Section 6 defines when a transaction occurs. It occurs when it can prejudice the rights of third parties, and not when it actually occurs between the parties to it. For example, a creditor does not need this act to set aside a fraudulent security interest that is never filed; the creditor can defeat that interest under the Uniform Commercial Code. Subsection 5 of this Section also states the time when an obligation is incurred.

Section 7 describes the remedies a creditor has to attack and avoid a fraudulent transfer or obligation.

Section 8, however, protects a good faith purchaser for reasonably equivalent value who did not share in the debtor's fraudulent purpose and subsequent good faith transferees for value who are sufficiently remote. Subsection (d) also gives a good faith transferee or obligee against whom the transaction can be avoided protection for any value given.

Subsection (e) is important as protecting lease terminations and security interest enforcement against "Durrett type" attacks, and Subsection (f) allows "workouts" and the like to occur.

Section 9 prescribes statutes of limitation specifically for the act.

Section 10 states the act is supplemented by other law and Section 11 specifies that in interpreting the act, precedent from other states that have enacted it should be used to maintain uniformity.

Section 12 provides the title.

Section 13 repeals the current statutes on the subject, including any old predecessor versions of this act.

DURRETT, THE UNIFORM FRAUDULENT TRANSFER ACT, AND
FEDERAL BANKRUPTCY LAW - SORTING OUT CONFUSION

There has been much confusion over the relationship of mortgage foreclosures, however done, and fraudulent conveyance statutes, including the 1984 Uniform Fraudulent Transfer Act (UFTA). The confusion results from a single, now notorious case, Durrett v. Washington Nat. Ins. Co., 621 F.2d 201 (5th Cir. 1980). The Court, in Durrett, held a noncollusive mortgage foreclosure conducted pursuant to Texas law a constructively fraudulent transfer under Section 67d of the Bankruptcy Act. The Bankruptcy Act has fraudulent transfer provisions directly analogous to the UFTA.

Durrett has not been followed in all circuits of the federal courts. It has been directly rejected in the Sixth and Ninth Circuits, for example. Its influence on state law in the interpretation of the 1918 Uniform Fraudulent Conveyance Act (UFCA) and those states still following the common law is not yet clear. Much speculation attends the possibilities in that regard, however.

Why is Durrett so important? Its holding calls the validity of the bulk of mortgage foreclosure sales into question. Almost never do such sales realize the current market price for real estate bought and sold in the ordinary course. A key element in fraudulent conveyance analysis is the concept of "fair consideration" or "reasonably equivalent value." In Durrett, the foreclosure sale realized less than 70% of the alleged market value, and was a fraudulent transfer for that fact.

As a result of Durrett, buyers in foreclosure sales lose assurance of title. Lenders cannot be sure of lending practices. The uncertainty that Durrett forecasts has large economic impact in real estate markets.

UFTA attempts to alleviate the difficulties that Durrett suggests. In Section 3(b), value is "reasonably equivalent value" if given in "a regularly conducted, noncollusive foreclosure sale or execution of a power of sale for the acquisition or disposition of the interest of the debtor upon default under a mortgage, deed of trust, or security agreement." Adoption of this provision would preclude a Durrett type of holding in any state adopting UFTA. Only private, non-public types of transfers, such as some kinds of deed in lieu of foreclosure, would be vulnerable. But these are exactly the kinds of transfers UFTA is designed to remedy anyway. UFTA Section 3(b) removes the uncertainty that Durrett has created, insofar as state law is concerned.

We must be clear, however, on the distinction between federal and state law, the Bankruptcy Act and state fraudulent conveyance law. Durrett still applies in federal bankruptcy law,

UNIFORM FRAUDULENT TRANSFER ACT

1984 ACT

Historical Note

The Uniform Fraudulent Transfer Act was approved by the National Conference of Commissioners on Uniform State Laws in 1984. The complete text of the act, the prefatory note and comments are set forth in this supplement.

PREFATORY NOTE

The Uniform Fraudulent Conveyance Act was promulgated by the Conference of Commissioners on Uniform State Laws in 1918. The Act has been adopted in 25 jurisdictions, including the Virgin Islands. It has also been adopted in the sections of the Bankruptcy Act of 1938 and the Bankruptcy Reform Act of 1978 that deal with fraudulent transfers and obligations.

The Uniform Act was a codification of the "better" decisions applying the Statute of 13 Elizabeth. See Analysis of H.R. 12339, 74th Cong., 2d Sess. 213 (1936). The English statute was enacted in some form in many states, but, whether or not so enacted, the voidability of fraudulent transfer was part of the law of every American jurisdiction. Since the intent to hinder, delay, or defraud creditors is seldom susceptible of direct proof, courts have relied on badges of fraud. The weight given these badges varied greatly from jurisdiction, and the Conference sought to minimize or eliminate the diversity by providing that proof of certain fact combinations would conclusively establish fraud. In the absence of evidence of the existence of such facts, proof of a fraudulent transfer was to depend on the evidence of actual intent. An important reform effected by the Uniform Act was the elimination of any requirement that a creditor have obtained a judgment or execution returned unsatisfied before bringing an action to avoid a transfer as fraudulent. See *American Surety Co. v. Conner*, 251 N.Y. 1, 166 N.E. 783, 67 A.L.R. 244 (1929) (per C.J. Cardozo).

The Conference was persuaded in 1979 to appoint a committee to undertake a study of the Uniform Act with a view to preparing the draft of a revision. The Conference was influenced by the following considerations:

- (1) The Bankruptcy Reform Act of 1978 has made numerous changes in the section of that Act dealing with fraudulent transfers and obligations, thereby substantially reducing the correspondence of the provisions of the federal bankruptcy law on fraudulent transfers with the Uniform Act.
- (2) The Committee on Corporate Laws of the Section of Corporations, Banking & Business Law of the American Bar Association, engaged in revising the Model Corporation Act, suggested that the Conference review provisions of the Uniform Act with a view to determining whether the Acts are consistent in respect to the treatment of dividend distributions.
- (3) The Uniform Commercial Code, enacted at least in part by all 50 states, had substantially modified related rules of law regulating transfers of personal property, notably by facilitating the making and perfection of security transfers against attack by unsecured creditors.
- (4) Debtors and trustees in a number of cases have avoided foreclosure of security interests by invoking the fraudulent transfer section of the Bankruptcy Reform Act.
- (5) The Model Rules of Professional Conduct adopted by the House of Delegates of the American Bar Association on August 2, 1983, forbid a lawyer to counsel or to assist a client in conduct that the lawyer knows is fraudulent.

The Drafting Committee appointed by the Conference held its first meeting in January of 1983. A first reading of a draft of the revision of the Uniform Fraudulent Conveyance Act was had at the Conference's meeting in Boca Raton, Florida, on July 27, 1983. The Committee held four meetings in addition to a meeting held in connection with the Conference meeting in Boca Raton. Meetings were also attended by the following representatives of interested organizations:

Robert Rosenberg, Esq., of the American Bar Association;

FRAUDULENT TRANSFER ACT

Richard Cherin, Esq., of the Commercial Financial Services Committee of the Corporation, Banking and Business Law Section of the American Bar Association;

Robert Zinman, Esq., of the American College of Real Estate Lawyers;

Bruce Bernstein, Esq., of the National Commercial Finance Association;

Ernest E. Specks, Esq., of the Real Property, Probate and Trust Law Section of the American Bar Association.

The Committee determined to rename the Act the Uniform Fraudulent Transfer Act in recognition of its applicability to transfers of personal property as well as real property, "conveyance" having a connotation restricting it to a transfer of personal property. As noted in Comment (2) accompanying § 1(2) and Comment (8) accompanying § 4, however, this Act, like the original Uniform Act, does not purport to cover the whole law of voidable transfers and obligations. The limited scope of the original Act did not impair its effectiveness in achieving uniformity in the areas covered. See McLaughlin, Application of the Uniform Fraudulent Conveyance Act, 46 Harv.L.Rev. 404, 405 (1933).

The basic structure and approach of the Uniform Fraudulent Conveyance Act are preserved in the Uniform Fraudulent Transfer Act. There are two sections in the new Act delineating what transfers and obligations are fraudulent. Section 4(a) is an adaptation of three sections of the U.F.C.A.; § 5(a) is an adaptation of another section of the U.F.C.A.; and § 5(b) is new. One section of the U.F.C.A. (§ 8) is not carried forward into the new Act because deemed to be redundant in part and in part susceptible of inequitable application. Both Acts declare a transfer made or an obligation incurred with actual intent to hinder, delay, or defraud creditors to be fraudulent. Both Acts render a transfer made or obligation incurred without adequate consideration to be constructively fraudulent—i.e., without regard to the actual intent of the parties—under one of the following conditions:

(1) the debtor was left by the transfer or obligation with unreasonably small assets for a transaction or the business in which he was engaged;

(2) the debtor intended to incur, or believed that he would incur, more debts than he would be able to pay; or

(3) the debtor was insolvent at the time or as a result of the transfer or obligation.

As under the original Uniform Fraudulent Conveyance Act a transfer or obligation that is constructively fraudulent because insolvency concurs with or follows failure to receive adequate consideration is voidable only by a creditor in existence at the time the transfer occurs or the obligation is incurred. Either an existing or subsequent creditor may avoid a transfer or obligation for inadequate consideration when accompanied by the financial condition specified in § 4(a)(2)(i) or the mental state specified in § 4(a)(2)(ii).

Reasonably equivalent value is required in order to constitute adequate consideration under the revised Act. The revision follows the Bankruptcy Code in eliminating good faith on the part of the transferee or obligee as an issue in the determination of whether adequate consideration is given by a transferee or obligee. The new Act, like the Bankruptcy Act, allows the transferee or obligee to show good faith in defense after a creditor establishes that a fraudulent transfer has been made or a fraudulent obligation has been incurred. Thus a showing by a defendant that a reasonable equivalent has been given in good faith for a transfer or obligation is a complete defense although the debtor is shown to have intended to hinder, delay, or defraud creditors.

A good faith transferee or obligee who has given less than a reasonable equivalent is nevertheless allowed a reduction in a liability to the extent of the value given. The new Act, like the Bankruptcy Code, eliminates the provision of the Uniform Fraudulent Conveyance Act that enables a creditor to attack a security transfer on the ground that the value of the property transferred is disproportionate to the debt secured. The premise of the new Act is that the value of the interest transferred for security is measured by and thus corresponds exactly to the debt secured. Foreclosure of a debtor's interest by a regularly conducted, noncollusive sale on default under a mortgage or other security agreement may not be avoided under the Act as a transfer for less than a reasonably equivalent value.

FRAUDULENT TRANSFER ACT

The definition of insolvency under the Act is adapted from the definition of the term in the Bankruptcy Code. Insolvency is presumed from proof of a failure generally to pay debts as they become due.

The new Act adds a new category of fraudulent transfer, namely, a preferential transfer by an insolvent insider to a creditor who had reasonable cause to believe the debtor to be insolvent. An insider is defined in much the same way as in the Bankruptcy Code and includes a relative, also defined as in the Bankruptcy Code, a director or officer of a corporate debtor, a partner, or a person in control of a debtor. This provision is available only to an existing creditor. Its premise is that an insolvent debtor is obliged to pay debts to creditors not related to him before paying those who are insiders.

The new Act omits any provision directed particularly at transfers or obligations of insolvent partnership debtors. Under § 8 of the Uniform Fraudulent Conveyance Act any transfer made or obligation incurred by an insolvent partnership to a partner is fraudulent without regard to intent or adequacy of consideration. So categorical a condemnation of a partnership transaction with a partner may unfairly prejudice the interests of a partner's separate creditors. The new Act also omits as redundant a provision in the original Act that makes fraudulent a transfer made or obligation incurred by an insolvent partnership for less than a fair consideration to the partnership.

Section 7 lists the remedies available to creditors under the new Act. It eliminates as unnecessary and confusing a differentiation made in the original Act between the remedies available to holders of matured claims and those holding unmatured claims. Since promulgation of the Uniform Fraudulent Conveyance Act the Supreme Court has imposed restrictions on the availability and use of prejudgment remedies. As a result many states have amended their statutes and rules applicable to such remedies, and it is frequently unclear whether a state's procedures include a prejudgment remedy against a fraudulent transfer or obligation. A bracketed paragraph is included in Section 7 for adoption by those states that elect to make such a remedy available.

Section 8 prescribes the measure of liability of a transferee or obligee under the Act and enumerates defenses. Defenses against avoidance of a preferential transfer to an insider under § 5(b) include an adaptation of defenses available under § 547(c)(2) and (4) of the Bankruptcy Code when such a transfer is sought to be avoided as a preference by the trustee in bankruptcy. In addition a preferential transfer may be justified when shown to be made pursuant to a good faith effort to stave off forced liquidation and rehabilitate the debtor. Section 8 also precludes avoidance, as a constructively fraudulent transfer, of the termination of a lease on default or the enforcement of a security interest in compliance with Article 9 of the Uniform Commercial Code.

The new Act includes a new section specifying when a transfer is made or an obligation is incurred. The section specifying the time when a transfer occurs is adapted from Section 548(d) of the Bankruptcy Code. Its premise is that if the law prescribes a mode for making the transfer a matter of public record or notice, it is not deemed to be made for any purpose under the Act until it has become such a matter of record or notice.

The new Act also includes a statute of limitations that bars the right rather than the remedy on expiration of the statutory periods prescribed. The law governing limitations on actions to avoid fraudulent transfers among the states is unclear and full of diversity. The Act recognizes that laches and estoppel may operate to preclude a particular creditor from pursuing a remedy against a fraudulent transfer or obligation even though the statutory period of limitations has not run.

UNIFORM FRAUDULENT TRANSFER ACT

Section

1. Definitions.
2. Insolvency.
3. Value.
4. Transfers Fraudulent as to Present and Future Creditors.
5. Transfers Fraudulent as to Present Creditors.
6. When Transfer is Made or Obligation is Incurred.

Section

7. Remedies of Creditors.
8. Defenses, Liability, and Protection of Transferee.
9. Extinguishment of [Claim for Relief] [Cause of Action].
10. Supplementary Provisions.
11. Uniformity of Application and Construction.
12. Short Title.
13. Repeal.

A Few Facts About
THE UNIFORM STATUTORY RULE AGAINST PERPETUITIES

PURPOSES: To conform the rule against perpetuities to its original purpose of preventing perpetual trusts without defeating reasonable trusts; and to minimize and simplify perpetuity litigation as much as possible.

ORIGIN: Completed by the Uniform Law Commissioners in 1986. Amended in 1990 by adding section 1(e). Became part of Uniform Probate Code in 1990 and of Uniform Act on Intestacy, Wills, and Donative Transfers in 1991.

ENDORSED BY: House of Delegates of American Bar Association, on unanimous recommendation of the Council of the ABA Section of Real Property, Probate and Trust Law

Board of Regents of American College of Trust and Estate Counsel
(unanimous)

Board of Governors of American College of Real Estate Lawyers
(unanimous)

Joint Editorial Board for Uniform Probate Code (unanimous)

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	Georgia	Nebraska	South Carolina
	Indiana *	Nevada	

For further information, please contact Lawrence W. Waggoner, Hutchins Hall, University of Michigan Law School, Ann Arbor, MI 48109-1215, telephone 313-763-2586, or John M. McCabe or Katie Robinson, NCCUSL, 676 North St. Clair St., Suite 1700, Chicago, IL 60611, telephone 312-915-0195.

* 1991 Adoptions

Statutory Rule Against Perpetuities (1986) (1990)



-  Amended Version Enacted
-  Enacted
-  Substantially Similar
-  No Enactment

* Introduced this year

JULY 16, 1993

PUERTO RICO




US VIRGIN ISLANDS

Fraudulent Transfer (1984)



PUERTO RICO

US VIRGIN ISLANDS

-  Enacted
-  Substantially Similar
-  No Enactment

* Introduced this year

JULY 16, 1983

DIVISION OF LEGAL SERVICES

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Mail Stop 3101


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Juneau, Alaska 99801-2105

MEMORANDUM

January 21, 1994

SUBJECT: Sectional Summary of Uniform Fraudulent Transfer Act. (Work Order No. 8-LS1461A)

TO: Representative Brian Porter

FROM: David R. Dierdorff 
Revisor of Statutes

You have requested a sectional summary of the above-described bill.

As a preliminary matter, note that a sectional summary of a bill should not be considered an authoritative interpretation of the bill and the bill itself is the best statement of its contents. If you would like an interpretation of the bill as it may apply to a particular set of circumstances, please advise.

This summary relies heavily on the prefatory notes and comments to the Uniform Act that were prepared by the National Conference of Commissioners on Uniform State Laws (NCCUSL). In most instances, the text will be that of the NCCUSL, with modifications only as necessary to correct section references and the like.

INTRODUCTION AND OVERVIEW

The Uniform Fraudulent Transfer Act was approved by the National Conference of Commissioners on Uniform State Laws in 1984 and by the American Bar Association on February 18, 1985. This Act was preceded by the Uniform Fraudulent Conveyance Act, promulgated by the Conference of Commissioners on Uniform State Laws in 1918 and adopted in 25 jurisdictions, including the Virgin Islands. The 1918 Act has also been adopted in the sections of the Bankruptcy Act of 1938 and the Bankruptcy Reform Act of 1978 that deal with fraudulent transfers and obligations.

Alaska did not adopt the earlier Act. Current Alaska law, found at AS 34.40, derives from late 19th century Oregon law, and has received little legislative attention. Even though Alaska did not enact the 1918 Act, the official commentary's references to it and to differences between the new Uniform Act and it, are helpful in understanding

the substantive effect of the bill. Consequently, this memorandum retains those references.

The 1918 Uniform Act was a codification of the "better" decisions applying the Statute of 13 Elizabeth. See Analysis of H.R. 12339, 74th Cong., 2d Sess. 213 (1936). The English statute was enacted in some form in many states, but, whether or not so enacted, the voidability of a fraudulent transfer was part of the law of every American jurisdiction (*c.f.* AS 34.40.010). Because the intent to hinder, delay, or defraud creditors is seldom susceptible of direct proof, courts have relied on "badges of fraud." The weight given these badges varied greatly between jurisdictions, and the Conference sought to minimize or eliminate the diversity by providing that proof of certain fact combinations would conclusively establish fraud. In the absence of evidence of the existence of such facts, proof of a fraudulent transfer was to depend on the evidence of actual intent. An important reform effected by 1918 Uniform Act was the elimination of any requirement that a creditor have obtained a judgment or execution returned unsatisfied before bringing an action to avoid a transfer as fraudulent. See American Surety Co. v. Conner, 251 N.Y. 1, 166 N.E. 783, 67 A.L.R. 244 (1929) (per C.J. Cardozo).

The NCCUSL was persuaded in 1979 to appoint a committee to undertake a study of the 1918 Uniform Act with a view to preparing the draft of a revision. The Conference was influenced by the following considerations:

- (1) The Bankruptcy Reform Act of 1978 made numerous changes in the section of that Act dealing with fraudulent transfers and obligations, thereby substantially reducing the correspondence of the provisions of the federal bankruptcy law on fraudulent transfers with the Uniform Act.
- (2) The Committee on Corporate Laws of the Section of Corporations, Banking & Business Law of the American Bar Association, engaged in revising the Model Corporation Act, suggested that the Conference review provisions of the Uniform Act with a view to determining whether the Acts are consistent in respect to the treatment of dividend distributions.
- (3) The Uniform Commercial Code, enacted at least in part by all 50 states, had substantially modified related rules of law regulating transfers of personal property, notably by facilitating the making and perfection of security transfers against attack by unsecured creditors.
- (4) Debtors and trustees in a number of cases have avoided foreclosure of security interests by invoking the fraudulent transfer section of the Bankruptcy Reform Act.

(5) The Model Rules of Professional Conduct adopted by the House of Delegates of the American Bar Association on August 2, 1983, forbid a lawyer to counsel or to assist a client in conduct that the lawyer knows is fraudulent.

The drafting committee determined to rename the Act the Uniform Fraudulent Transfer Act in recognition of its applicability to transfers of personal property as well as real property, "conveyance" having a connotation restricting it to a transfer of personal property. This Act, like the original Uniform Act, does not purport to cover the whole law of voidable transfers and obligations. The limited scope of the original Act did not impair its effectiveness in achieving uniformity in the areas covered. See McLaughlin, Application of the Uniform Fraudulent Conveyance Act, 46 Harv.L.Rev. 404, 405 (1933).

The basic structure and approach of the 1918 Act are preserved in the Uniform Fraudulent Transfer Act. There are two sections in the new Act delineating what transfers and obligations are fraudulent. Section 4(a) (Sec. 34.41.030(a)) is an adaptation of three sections of the 1918 Act; § 5(a) (Sec. 34.41.040(a)) is an adaptation of another section of that Act and § 5(b) (Sec. 34.41.040(b)) is new. One section of the 1918 Act (§ 8) is not carried forward into the new Act because it was believed to be redundant in part and in part susceptible of inequitable application. Both Acts declare a transfer made or an obligation incurred with actual intent to hinder, delay, or defraud creditors to be fraudulent. Both Acts render a transfer made or obligation incurred without adequate consideration to be constructively fraudulent -- *ie.*, without regard to the actual intent of the parties -- under one of the following conditions:

- (1) the debtor was left by the transfer or obligation with unreasonably small assets for a transaction or the business in which the debtor was engaged;
- (2) the debtor intended to incur, or believed that the debtor would incur, more debts than the debtor would be able to pay; or
- (3) the debtor was insolvent at the time or as a result of the transfer or obligation

As under the 1918 Act a transfer or obligation that is constructively fraudulent because insolvency concurs with or follows failure to receive adequate consideration is voidable only by a creditor in existence at the time the transfer occurs or the obligation is incurred. Either an existing or subsequent creditor may avoid a transfer or obligation for inadequate consideration when accompanied by the financial condition specified in Sec. 34.41.030(a)(2)(A) or the mental state specified in Sec. 34.41.030(a)(2)(B).

Reasonably equivalent value is required in order to constitute adequate consideration under the revised Act. The revision follows the Bankruptcy Code in eliminating good faith on the part of the transferee or obligee as an issue in the determination of whether adequate consideration is given by a transferee or obligee. The new Act, like the Bankruptcy Act, allows the transferee or obligee to show good faith in defense after a creditor establishes that a fraudulent transfer has been made or a fraudulent obligation has been incurred. Thus, a showing by a defendant that a reasonable equivalent has been given in good faith for a transfer or obligation is a complete defense although the debtor is shown to have intended to hinder, delay, or defraud creditors.

A good faith transferee or obligee who has given less than a reasonable equivalent is nevertheless allowed a reduction in a liability to the extent of the value given. The new Act, like the Bankruptcy Code, eliminates the provision of the 1918 Act that enables a creditor to attack a security transfer on the ground that the value of the property transferred is disproportionate to the debt secured. The premise of the new Act is that the value of the interest transferred for security is measured by and thus corresponds exactly to the debt secured. Foreclosure of a debtor's interest by a regularly conducted, noncollusive sale on default under a mortgage or other security agreement may not be avoided under the Act as a transfer for less than a reasonably equivalent value.

The definition of insolvency under the Act is adapted from the definition of the term in the Bankruptcy Code. Insolvency is presumed from proof of a failure generally to pay debts as they become due.

The new Act adds a new category of fraudulent transfer, namely, a preferential transfer by an insolvent insider to a creditor who had reasonable cause to believe the debtor to be insolvent. An insider is defined in much the same way as in the Bankruptcy Code and includes a relative, also defined as in the Bankruptcy Code, a director or officer of a corporate debtor, a partner, or a person in control of a debtor. This provision is available only to an existing creditor. Its premise is that an insolvent debtor is obliged to pay debts to creditors not related to the debtor before paying those who are insiders.

The new Act omits any provision directed particularly at transfers or obligations of insolvent partnership debtors. Under § 8 of the 1918 Act, any transfer made or obligation incurred by an insolvent partnership to a partner was deemed fraudulent without regard to intent or adequacy of consideration. So categorical a condemnation of a partnership transaction with a partner may unfairly prejudice the interests of a partner's separate creditors. The new Act also omits as redundant a provision in the 1918 Act that makes fraudulent a transfer made or obligation incurred by an insolvent partnership for less than a fair consideration to the partnership.

Section 34.41.060 lists the remedies available to creditors under the new Act. It eliminates as unnecessary and confusing a differentiation made in the 1918 Act between the remedies available to holders of matured claims and those holding unmatured claims. Since promulgation of the 1918 Act, the United States Supreme Court has imposed restrictions on the availability and use of prejudgment remedies. As a result many states have amended their statutes and rules applicable to such remedies, and it is frequently unclear whether a state's procedures include a prejudgment remedy against a fraudulent transfer or obligation. Paragraph (a)(2) is included in Sec. 34.41.060 to make such a remedy available.

Section 34.41.070 prescribes the measure of liability of a transferee or obligee under the Act and enumerates defenses. Defenses against avoidance of a preferential transfer to an insider under Sec. 34.41.040(b) include an adaptation of defenses available under § 547(c)(2) and (4) of the Bankruptcy Code when such a transfer is sought to be avoided as a preference by the trustee in bankruptcy. In addition a preferential transfer may be justified when shown to be made pursuant to a good faith effort to stave off forced liquidation and rehabilitate the debtor. Section 34.41.070 also precludes avoidance, as a constructively fraudulent transfer, of the termination of a lease on default or the enforcement of a security interest in compliance with Article 9 of the Uniform Commercial Code (AS 45.09).

The new Act includes a new section specifying when a transfer is made or an obligation is incurred. The section specifying the time when a transfer occurs is adapted from § 548(d) of the Bankruptcy Code. Its premise is that if the law prescribes a mode for making the transfer a matter of public record or notice, it is not deemed to be made for any purpose under the Act until it has become such a matter of record or notice.

The new Act also includes a statute of limitations that bars the right rather than the remedy on expiration of the statutory periods prescribed. The law governing limitations on actions to avoid fraudulent transfers among the states is unclear and full of diversity. The Act recognizes that laches and estoppel may operate to preclude a particular creditor from pursuing a remedy against a fraudulent transfer or obligation even though the statutory period of limitations has not run.

SECTIONAL ANALYSIS AND COMMENTARY

Section 1. Enacts the Uniform Fraudulent Transfer Act as a new chapter, AS 34.41. The chapter consists of the following provisions:

Sec. 34.41.010. This section sets out the circumstances under which a debtor is deemed to be insolvent.

OFFICIAL COMMENTARY

(1) Subsection (a) is derived from the definition of "insolvent" in § 101 (29)(A) of the Bankruptcy Code. The definition in subsection (a) and the correlated definition of partnership insolvency in subsection (c) contemplate a fair valuation of the debts as well as the assets of the debtor. As under the definition of the same term in § 2 of the 1918 Act, exempt property is excluded from the computation of the value of the assets. See Sec. 34.41.110(2). For similar reasons, interests in valid spendthrift trusts and interests in tenancies by the entireties that cannot be severed by a creditor of only one tenant are not included. See the comment to Sec. 34.41.110(2), *infra*. Since a valid lien also precludes an unsecured creditor from collecting the creditor's claim from the encumbered interest in a debtor's property, both the encumbered interest and the debt secured thereby are excluded from the computation of insolvency under this Act. See Sec. 34.41.110(2) and subsection (e) of this section.

(2) Subsection (b) establishes a rebuttable presumption of insolvency from the fact of general nonpayment of debts as they become due. Such general nonpayment is a ground for the filing of an involuntary petition under § 303(h)(1) of the Bankruptcy Code. See also AS 45.01.201(24) (Uniform Commercial Code), which, in part, declares a person to be "insolvent" who "has ceased to pay the person's debts in the ordinary course of business or cannot pay the person's debts as they become due." The presumption imposes on the party against whom the presumption is directed the burden of proving that the nonexistence of insolvency as defined in subsection (a) is more probable than its existence. See Uniform Rules of Evidence (1974 Act), Rule 310(a). The 1974 Uniform Rule 301(a) conforms to the Final Draft of Federal Rule 301 as submitted to the United States Supreme Court by the Advisory Committee on Federal Rules of Evidence. "The so-called 'bursting bubble' theory, under which a presumption vanishes upon the introduction of evidence which would support a finding of the nonexistence of the presumed fact, even though not believed is rejected as according presumptions too 'slight and evanescent' an effect." Advisory Committee's Note to Rule 301. See also 1 J. Weinstein & M. Berger, Evidence (1982).

The presumption is established in recognition of the difficulties typically imposed on a creditor in proving insolvency in the bankruptcy sense, as provided in subsection (a). See generally Levit, The Archaic Concept of Balance-Sheet Insolvency, 47 Am.Bankr.L.J. 215 (1973). Not only is the relevant information in the possession of a noncooperative debtor but the debtor's records are more often than not incomplete and inaccurate. As a practical matter, insolvency is most cogently evidenced by a general cessation of payment of debts, as has long been recognized by the laws of other countries and is now reflected in the Bankruptcy Code. See Honsberger, Failure to Pay One's Debts Generally as They Become Due: The Experience of France and Canada, 54 Am.Bankr.L.J. 153 (1980); J. MacLachlan,

Bankruptcy 13, 63-64, 436 (1956). In determining whether a debtor is paying its debts generally as they become due, the court should look at more than the amount and due dates of the indebtedness. The court should also take into account such factors as the number of the debtor's debts, the proportion of those debts not being paid, the duration of the nonpayment, and the existence of bona fide disputes or other special circumstances alleged to constitute an explanation for the stoppage of payments. The court's determination may be affected by a consideration of the debtor's payment practices prior to the period of alleged nonpayment and the payment practices of the trade or industry in which the debtor is engaged. The case law that has developed under § 303(h)(1) of the Bankruptcy Code has not required a showing that a debtor has failed or refused to pay a majority in number and amount of the person's debts in order to prove general nonpayment of debts as they become due. See, e.g., Hill v. Cargill, Inc. (In re Hill), 8 B.R. 779, 3 C.B.C.2d 920 (Bk.D.Minn.1981) (nonpayment of three largest debts held to constitute general nonpayment, although small debts were being paid); In re All Media Properties, Inc., 5 B.R. 126, 6 B.C.D. 586, 2 C.B.C.2d 449 (Bk.S.D.Tex.1980) (missing significant number of payments or regularly missing payments significant in amount said to constitute general nonpayment; missing payments on more than 50% of aggregate of claims said not to be required to show general nonpayment; nonpayment for more than 30 days after billing held to establish nonpayment of a debt when it is due); In re Kreidler Import Corp., 4 B.R. 256, 6 B.C.D. 608, 2 C.B.C.2d 159 (Bk.D.Md. 1980) (nonpayment of one debt constituting 97% of debtor's total indebtedness held to constitute general nonpayment). A presumption of insolvency does not arise from nonpayment of a debt as to which there is a genuine bona fide dispute, even though the debt is a substantial part of the debtor's indebtedness. Cf. 11 U.S.C. 303(h)(1), as amended by § 426(b) of Public Law No. 98-882, the Bankruptcy Amendments and Federal Judgeship Act of 1984.

(3) Subsection (c) is derived from the definition of partnership insolvency in § 101(29)(B) of the Bankruptcy Code. The definition conforms generally to the definition of the same term in § 2(2) of the 1918 Act.

(4) Subsection (d) follows the approach of the definition of "insolvency" in § 101(29) of the Bankruptcy Code by excluding from the computation of the value of the debtor's assets any value that can be realized only by avoiding a transfer of an interest formerly held by the debtor or by discovery or pursuit of property that has been fraudulently concealed or removed.

(5) Subsection (e) is new. It makes clear the purpose not to render a person insolvent under this section by counting as a debt an obligation secured by property of the debtor that is not counted as an asset. See also comments to subsection (a), *supra*, and Sec. 34.41.110(2), *infra*.

Sec. 34.41.020. This section defines "value" as used in various contexts in this Act, frequently with a qualifying adjective. The word appears in the following provisions:

Sec. 34.41.030(a)(2) ("reasonably equivalent value");
Sec. 34.41.030(b)(8) ("value ... reasonably equivalent");
Sec. 34.41.040(a) ("reasonably equivalent value");
Sec. 34.41.040(b) ("present, reasonably equivalent value");
Sec. 34.41.070(a) ("reasonably equivalent value");
Sec. 34.41.070(b), (c), (d), and (e) ("value");
Sec. 34.41.070(f)(1) ("new value"); and
Sec. 34.41.070(f)(3) ("present value").

OFFICIAL COMMENTARY

(1) Subsection (a) is adapted from § 548(d)(2)(A) of the Bankruptcy Code. See also § 3(a) of the 1918 Act. The definition in the section is not exclusive. "Value" is to be determined in light of the purpose of the Act to protect a debtor's estate from being depleted to the prejudice of the debtor's unsecured creditors. Consideration having no utility from a creditor's viewpoint does not satisfy the statutory definition. The definition does not specify all the kinds of consideration that do not constitute value for the purposes of this Act -- e.g., love and affection. See, e.g., United States v. West, 299 F.Supp. 661, 666 (D.Del. 1969).

(2) Subsection (a) does not indicate what is "reasonably equivalent value" for a transfer or obligation. Under this Act, as under § 548(a)(2) of the Bankruptcy Code, a transfer for security is ordinarily for a reasonably equivalent value notwithstanding a discrepancy between the value of the asset transferred and the debt secured, since the amount of the debt is the measure of the value of the interest in the asset that is transferred. See, e.g., Peoples-Pittsburgh Trust Co., v. Holy Family Polish Nat'l Catholic Church, Carnegie, Pa., 341 Pa. 390, 19 A.2d 360 (1941). If, however, a transfer purports to secure more than the debt actually incurred or to be incurred, it may be found to be for less than a reasonably equivalent value. See e.g., In re Peoria Braumeister Co., 138 F.2d 520, 523 (7th Cir. 1943) (chattel mortgage securing a \$3,000 note held to be fraudulent when the debt secured was only \$2,500); Hartford Acc. & Indemnity Co. v. Jirasek, 254 Mich. 131, 140, 235 N.W. 836, 839 (1931) (quitclaim deed given as mortgage held to be fraudulent to the extent the value of the property transferred exceeded the indebtedness secured). If the debt is a fraudulent obligation under this Act, a transfer to secure it as well as the obligation would be vulnerable to attack as fraudulent. A transfer to satisfy or secure an antecedent debt owed an insider is also subject to avoidance under the conditions specified in Sec. 34.41.040(b).

(3) Section 3(a) of the 1918 Act has been thought not to recognize that an unperformed promise could constitute fair consideration. See McLaughlin, Application of the Uniform Fraudulent Conveyance Act, 46 Harv.L. Rev. 404, 414 (1933). Courts construing these provisions of the prior law nevertheless have held unperformed promises to constitute value in a variety of circumstances. See, e.g., Harper v. Lloyd's Factors, Inc., 214 F.2d 662 (2d Cir. 1954) (transfer of money for promise of factor to discount transferor's purchase-money notes given to fur dealer); Schlecht v. Schlecht, 168 Minn. 168, 176-77, 209 N.W. 883, 886-87 (1926) (transfer for promise to make repairs and improvements on transferor's homestead); Farmer's Exchange Bank v. Oneida Motor Truck Co., 202 Wis. 266, 232 N.W. 536 (1930) (transfer in consideration of assumption of certain of transferor's liabilities); see also Hummel v. Cernocky, 161 F.2d 685 (7th Cir. 1947) (transfer in consideration of cash, assumption of a mortgage, payment of certain debts, and agreement to pay other debts). Likewise a transfer in consideration of a negotiable note discountable at a commercial bank, or the purchase from an established, solvent institution of an insurance policy, annuity, or contract to provide care and accommodations clearly appears to be for value. On the other hand, a transfer for an unperformed promise by an individual to support a parent or other transferor has generally been held voidable as a fraud on creditors of the transferor. See, e.g., Springfield Ins. Co. v. Fry, 267 F.Supp. 693 (N.D.Okla. 1967); Sandler v. Parlapiano, 236 App.Div. 70, 258 N.Y.Supp. 88 (1st Dep't 1932); Warwick Municipal Employees Credit Union v. Higham, 106 R.I. 363, 259 A.2d 852 (1969); Hulsether v. Sanders, 54 S.D. 412, 223 N.W. 335 (1929); Cooper v. Cooper, 22 Tenn.App. 473, 477, 124 S.W.2d 264, 267 (1939); Note, Rights of Creditors in Property Conveyed in Consideration of Future Support, 45 Iowa L.Rev. 546, 550-62 (1960). This Act adopts the view taken in the cases cited in determining whether an unperformed promise is value.

(4) Subsection (b) rejects the rule of such cases as Durrett v. Washington Nat. Ins. Co., 621 F.2d 201 (5th Cir.1980) (nonjudicial foreclosure of a mortgage avoided as a fraudulent transfer when the property of an insolvent mortgagor was sold for less than 70% of its fair value), and Abramson v. Lakewood Bank & Trust Co., 647 F.2d 547 (5th Cir.1981), cert. denied, 454 U.S. 1164 (1982) (nonjudicial foreclosure held to be fraudulent transfer if made without fair consideration). Subsection (b) adopts the view taken in Lawyers Title Ins. Corp. v. Madrid (In re Madrid), 21 B.R. 424 (B.A.P. 9th Cir.1982), aff'd on another ground, 725 F.2d 1197 (9th Cir.1984), that the price bid at a public foreclosure sale determines the fair value of the property sold. Subsection (b) prescribes the effect of a sale meeting its requirements, whether the asset sold is personal or real property. The rule of this subsection applies to a foreclosure by sale of the interest of a vendee under an installment land contract in accordance with applicable law that requires or permits the foreclosure to be effected by a sale in the same manner as the foreclosure of a mortgage. See G. Osborne, G. Nelson, & D. Whitman, Real Estate Finance Law 83-84, 95-97 (1979). The premise of the subsection is that "a sale of the collateral by the secured party as the normal

consequence of default ... [is] the safest way of establishing the fair value of the collateral" 2 G. Gilmore, *Security Interests in Personal Property* 1227 (1965).

If a lien given an insider for a present consideration is not perfected as against a subsequent bona fide purchaser or is so perfected after a delay following an extension of credit secured by the lien, foreclosure of the lien may result in a transfer for an antecedent debt that is voidable under Sec. 34.41.040(b), *infra*. Subsection (b) does not apply to an action under Sec. 34.41.030(a)(1) to avoid a transfer or obligation because made or incurred with actual intent to hinder, delay, or defraud any creditor.

(5) Subsection (c) is an adaptation of § 547(c)(1) of the Bankruptcy Code. A transfer to an insider for an antecedent debt may be voidable under Sec. 34.41.040(b), *infra*.

Sec. 34.41.030. This section describes the transfers that are fraudulent as to present and future creditors and sets out factors that may be given consideration in determining whether the requisite intent to defraud was present.

OFFICIAL COMMENTARY

(1) Paragraph (a)(1) is derived from § 7 of the 1918 Act. Factors appropriate for consideration in determining actual intent under paragraph (a)(1) are specified in subsection (b).

(2) Paragraph (a)(2) is derived from §§ 5 and 6 of the 1918 Act but substitutes "reasonably equivalent value" for "fair consideration." The transferee's good faith was an element of "fair consideration" as defined in § 3 of the 1918 Act, and lack of fair consideration was one of the elements of a fraudulent transfer as defined in four sections of that Act. The transferee's good faith is irrelevant to a determination of the adequacy of the consideration under the new Act, but lack of good faith may be a basis for withholding protection of a transferee or obligee under Sec. 34.41.070, *infra*.

(3) Unlike the 1918 Act as originally promulgated, this Act does not prescribe different tests when a transfer is made for the purpose of security and when it is intended to be absolute. The premise of this Act is that when a transfer is for security only, the equity or value of the asset that exceeds the amount of the debt secured remains available to unsecured creditors and thus cannot be regarded as the subject of a fraudulent transfer merely because of the encumbrance resulting from an otherwise valid security transfer. Disproportion between the value of the asset securing the debt and the size of the debt secured does not, in the absence of circumstances indicating a purpose to hinder, delay, or defraud creditors, constitute

an impermissible hindrance to the enforcement of other creditors' rights against the debtor-transferor. Cf. AS 45.09.311 (Uniform Commercial Code).

(4) Subparagraph (a)(2)(A) of this section is an adaptation of § 5 of the 1918 Act, but substitutes "unreasonably small [assets] in relation to the business or transaction" for "unreasonably small capital." The reference to "capital" in the 1918 Act is ambiguous in that it may refer to net worth or to the par value of stock or to the consideration received for stock issued. The special meanings of "capital" in corporation law have no relevance in the law of fraudulent transfers. The subparagraph focuses attention on whether the amount of all the assets retained by the debtor was inadequate, *i.e.*, unreasonably small, in light of the needs of the business or transaction in which the debtor was engaged or about to engage.

(5) Subsection (b) is a nonexclusive catalogue of factors appropriate for consideration by the court in determining whether the debtor had an actual intent to hinder, delay, or defraud one or more creditors. Proof of the existence of any one or more of the factors enumerated in subsection (b) may be relevant evidence as to the debtor's actual intent, but does not create a presumption that the debtor has made a fraudulent transfer or incurred a fraudulent obligation. The list of factors includes most of the badges of fraud that have been recognized by the courts in construing and applying the Statute of 13 Elizabeth and § 7 of the 1918 Act. Proof of the presence of certain badges in combination establishes fraud conclusively -- *i.e.*, without regard to the actual intent of the parties -- when they concur as provided in (a)(2) of this section or in Sec. 34.41.040. The fact that a transfer has been made to a relative or to an affiliated corporation has not been regarded as a badge of fraud sufficient to warrant avoidance when unaccompanied by any other evidence of fraud. The courts have uniformly recognized, however, that a transfer to a closely related person warrants close scrutiny of the other circumstances, including the nature and extent of the consideration exchanged. See 1 G. Glenn, *Fraudulent Conveyances and Preferences* § 307 (Rev. ed. 1940). The second, third, fourth, and fifth factors listed are all adapted from the classic catalogue of badges of fraud provided by Lord Coke in Twyne's Case, 3 Coke 80b, 76 Eng.Rep. 809 (Star Chamber 1601). Lord Coke also included the use of a trust and the recitation in the instrument of transfer that it "was made honestly, truly, and bona fide," but the use of the trust is fraudulent only when accompanied by elements or badges specified in this Act, and recitals of "good faith" can no longer be regarded as significant evidence of a fraudulent intent.

(6) In considering the factors listed in subsection (b) a court should evaluate all the relevant circumstances involving a challenged transfer or obligation. Thus the court may appropriately take into account all indicia negating as well as those suggesting fraud, as illustrated in the following reported cases:

(a) Whether the transfer or obligation was to an insider: Salomon v. Kaiser (*In re Kaiser*), 722 F.2d 1574, 1582-83 (2d Cir.1983) (insolvent debtor's

purchase of two residences in the name of his spouse and the creation of a dummy corporation for the purpose of concealing assets held to evidence fraudulent intent); Banner Construction Corp. v. Arnold, 128 So.2d 893 (Fla. Dist. App. 1961) (assignment by one corporation to another having identical directors and stockholders constituted a badge of fraud); Travelers Indemnity Co. v. Cormaney, 258 Iowa 237, 138 N.W.2d 50 (1965) (transfer between spouses said to be a circumstance that shed suspicion on the transfer and that with other circumstances warranted avoidance); Hatheway v. Hanson, 230 Iowa 386, 297 N.W. 824 (1941) (transfer from parent to child said to require a critical examination of surrounding circumstances, which, together with other indicia of fraud, warranted avoidance); Lumpkins v. McPhee, 59 N.M. 442, 286 P.2d 299 (1955) (transfer from daughter to mother said to be indicative of fraud but transfer held not to be fraudulent due to adequacy of consideration and delivery of possession by transferor).

(b) Whether the transferor retained possession or control of the property after the transfer: Harris v. Shaw, 224 Ark. 150, 272 S.W.2d 53 (1954) (retention of property by transferor said to be a badge of fraud and, together with other badges, to warrant avoidance of transfer); Stephens v. Reginstein, 89 Ala. 561, 8 So. 68 (1890) (transferor's retention of control and management of property and business after transfer held material in determining transfer to be fraudulent); Allen v. Massey, 84 U.S. (17 Wall.) 351 (1872) (joint possession of furniture by transferor and transferee considered in holding transfer to be fraudulent); Warner v. Norton, 61 U.S. (20 How.) 448 (1857) (surrender of possession by transferor deemed to negate allegations of fraud).

(c) Whether the transfer or obligation was concealed or disclosed: Walton v. First National Bank, 13 Colo. 265, 22 P. 440 (1889) (agreement between parties to conceal the transfer from the public said to be one of the strongest badges of fraud); Warner v. Norton, 61 U.S. (20 How.) 448 (1857) (although secrecy said to be a circumstance from which, when coupled with other badges, fraud may be inferred, transfer was held not to be fraudulent when made in good faith and transferor surrendered possession); W.T. Raleigh Co. v. Barnett, 253 Ala. 433, 44 So.2d 585 (1950) (failure to record a deed in itself said not to evidence fraud, and transfer held not to be fraudulent).

(d) Whether, before the transfer was made or obligation was incurred, a creditor sued or threatened to sue the debtor: Harris v. Shaw, 224 Ark. 150, 272 S.W.2d 53 (1954) (transfer held to be fraudulent when causally connected to pendency of litigation and accompanied by other badges of fraud); Pergrem v. Smith, 255 S.W.2d 42 (Ky. App. 1953) (transfer in anticipation of suit deemed to be a badge of fraud; transfer held fraudulent when accompanied by

insolvency of transferor who was related to transferee); Bank of Sun Prairie v. Hovig, 218 F.Supp. 769 (W.D.Ark.1963) (although threat or pendency of litigation said to be an indicator of fraud, transfer was held not to be fraudulent when adequate consideration and good faith were shown).

(e) Whether the transfer was of substantially all the debtor's assets: Walbrun v. Babbitt, 83 U.S. (16 Wall.) 577 (1872) (sale by insolvent retail shop owner of all of his inventory in a single transaction held to be fraudulent); Cole v. Mercantile Trust Co., 133 N.Y. 164, 30 N.E. 847 (1892) (transfer of all property before plaintiff could obtain a judgment held to be fraudulent); Lumpkins v. McPhee, 59 N.M. 442, 286 P.2d 299 (1955) (although transfer of all assets said to indicate fraud, transfer held not to be fraudulent because full consideration was paid and transferor surrendered possession).

(f) Whether the debtor had absconded: In re Thomas, 199 F. 214 (N.D.N.Y.1912) (when debtor collected all of his money and property with the intent to abscond, fraudulent intent was held to be shown).

(g) Whether the debtor had removed or concealed assets: Bentley v. Young, 210 F. 202 (S.D.N.Y.1914), aff'd, 223 F. 536 (2d Cir.1915) (debtor's removal of goods from store to conceal their whereabouts and to sell them held to render sale fraudulent); Cioli v. Kenourgios, 59 Cal.App. 690, 211 P. 838 (1922) (debtor's sale of all assets and shipment of proceeds out of the country held to be fraudulent notwithstanding adequacy of consideration).

(h) Whether the value of the consideration received by the debtor was reasonably equivalent to the value of the asset transferred or the amount of the obligation incurred: Toomay v. Graham, 151 S.W.2d 119 (Mo.App.1941) (although mere inadequacy of consideration said not to be a badge of fraud, transfer held to be fraudulent when accompanied by badges of fraud); Texas Sand Co. v. Shield, 381 S.W.2d 48 (Tex.1964) (inadequate consideration said to be an indicator of fraud, and transfer held to be fraudulent because of inadequate consideration, pendency of suit, family relationship of transferee, and fact that all non-exempt property was transferred); Weigel v. Wood, 355 Mo. 11, 194 S.W.2d 40 (1946) (although inadequate consideration said to be a badge of fraud, transfer held not to be fraudulent when inadequacy not gross and not accompanied by any other badge fact that transfer was from father to son held not sufficient to establish fraud).

(i) Whether the debtor was insolvent or became insolvent shortly after the transfer was made or obligation was incurred: Harris v. Shaw, 224 Ark. 150, 272 S.W.2d 53 (1954) (insolvency of transferor said to be a badge of fraud and transfer held fraudulent when accompanied by other badges of fraud); Bank of Sun Prairie v. Hovig, 218 F.Supp. 769 (W.D.Ark.1963)

(although the insolvency of the debtor said to be a badge of fraud, transfer held not fraudulent when debtor was shown to be solvent, adequate consideration was paid, and good faith was shown, despite the pendency of suit); Wareheim v. Bayliss, 149 Md. 103, 131 A. 27 (1925) (although insolvency of debtor acknowledged to be an indicator of fraud, transfer held not to be fraudulent when adequate consideration was paid and whether debtor was insolvent in fact was doubtful).

(j) Whether the transfer occurred shortly before or shortly after a substantial debt was incurred: Commerce Bank of Lebanon v. Halladale A Corp., 618 S.W.2d 288, 292 (Mo.App.1981) (when transferors incurred substantial debts near in time to the transfer, transfer was held to be fraudulent due to inadequate consideration, close family relationship, the debtor's retention of possession, and the fact that almost all the debtors' property was transferred).

(7) The effect of the two transfers described in paragraph (b)(11), if not avoided, may be to permit a debtor and a lienor to deprive the debtor's unsecured creditors of access to the debtor's assets for the purpose of collecting their claims while the debtor, the debtor's affiliate or insider, and the lienor arrange for the beneficial use or disposition of the assets in accordance with their interests. The kind of disposition sought to be reached here is exemplified by that found in Northern Pacific Co. v. Boyd, 228 U.S. 482 (1913), the leading case in establishing the absolute priority doctrine in reorganization law. There the court held that a reorganization whereby the secured creditors and the management-owners retained their economic interests in a railroad through a foreclosure that cut off claims of unsecured creditors against its assets was in effect a fraudulent disposition (*id.* at 502-05). See Frank, Some Realistic Reflections on Some Aspects of Corporate Reorganization, 19 Va.L.Rev. 541, 693 (1933). For cases in which an analogous injury to unsecured creditors was inflicted by a lienor and a debtor, see Jackson v. Star Sprinkler Corp. of Florida, 575 F.2d 1223, 1231-34 (8th Cir. 1978); Heath v. Helmick, 173 F.2d 157, 161-62 (9th Cir.1949); Toner v. Nuss, 234 F.S. 457, 461-62 (E.D.Pa.1964); and see In re Spotless Tavern Co., Inc., 4 F.Supp. 752, 753, 755 (D.Md.1933).

(8) Nothing in subsection (b) is intended to affect the application of AS 45.02.402(b), AS 45.09.205, or 45.09.301, or former AS 45.06.105 (Uniform Commercial Code). AS 45.02.402(b) recognizes the generally prevailing rule that retention of possession of goods by a seller may be fraudulent, but limits the application of the rule by negating any imputation of fraud from "retention of possession in good faith and current course of trade by a merchant seller for a commercially reasonable time after a sale or identification." AS 45.09.205 explicitly negates any imputation of fraud from the grant of liberty by a secured creditor to a debtor to use, commingle, or dispose of personal property collateral or to account for its proceeds. The section recognizes that it does not relax prevailing requirements

for delivery of possession by a pledgor. Moreover, the section does not mitigate the general requirement of AS 45.09.301(a)(2) that a nonpossessory security interest in personal property must be perfected to be effective against a levying creditor. Finally, like the 1918 Act, this Act does not pre-empt the statutes governing bulk transfers, such as former AS 45.06 of the Uniform Commercial Code. Compliance with the cited sections of the Uniform Commercial Code does not, however, insulate a transfer or obligation from avoidance. Thus a sale by an insolvent debtor for less than a reasonably equivalent value would be voidable under this Act notwithstanding compliance with the Uniform Commercial Code.

Sec. 34.41.040. This section describes the transfers that are fraudulent as to creditors whose claims arose before the transfer was made or obligation was incurred by the debtor.

OFFICIAL COMMENTARY

(1) Subsection (a) is derived from § 4 of the 1918 Act. It adheres to the limitation of the protection of that section to a creditor who extended credit before the transfer or obligation described. As pointed out in comment (2) accompanying Sec. 34.41.030, this Act substitutes "reasonably equivalent value" for "fair consideration."

(2) Subsection (b) renders a preferential transfer -- *i.e.*, a transfer by an insolvent debtor for or on account of an antecedent debt -- to an insider vulnerable as a fraudulent transfer when the insider had reasonable cause to believe that the debtor was insolvent. This subsection adopts for general application the rule of such cases as Jackson Sound Studios, Inc. v. Travis, 473 F.2d 503 (5th Cir. 1973) (security transfer of corporation's equipment to corporate principal's mother perfected on eve of bankruptcy of corporation held to be fraudulent); In re Lamie Chemical Co., 296 F. 24 (4th Cir 1924)(corporate preference to corporate officers and directors held voidable by receiver when corporation was insolvent or nearly so and directors had already voted for liquidation); Stuart v. Larson, 298 F. 223 (8th Cir 1924), noted 38 Harv.L.Rev. 521 (1925) (corporate preference to director held voidable). See generally 2 G. Glenn, *Fraudulent Conveyances and Preferences* 386 (Rev. ed 1940). Subsection (b) overrules such cases as Epstein v. Goldstein, 107 F.2d 755, 757 (2d Cir. 1939) (transfer by insolvent husband to wife to secure his debt to her sustained against attack by husband's trustee); Hartford Accident & Indemnity Co. v. Jirasek, 254 Mich. 131, 139, 235 N.W. 836, 839 (1931) (mortgage given by debtor to his brother to secure an antecedent debt owed the brother sustained as not fraudulent).

(3) Subsection (b) does not extend as far as § 8(a) of the 1918 Act and § 548(b) of the Bankruptcy Code in rendering voidable a transfer or obligation incurred by an insolvent partnership to a partner, who is an insider of the partnership. The transfer to the partner is not vulnerable to avoidance under subsection (b) unless the

transfer was for an antecedent debt and the partner had reasonable cause to believe that the partnership was insolvent. The cited provisions of the 1918 Act and the Bankruptcy Act make any transfer by an insolvent partnership to a partner voidable. Avoidance of the partnership transfer without reference to the partner's state of mind and the nature of the consideration exchanged would be unduly harsh treatment of the creditors of the partner and unduly favorable to the creditors of the partnership.

Sec. 34.41.050. This section defines the moments in time at which when a claim for relief or cause of action to avoid a transfer or obligation arises.

OFFICIAL COMMENTARY

(1) One of the uncertainties in the law governing the avoidance of fraudulent transfers and obligations is the difficulty of determining when the claim for relief or cause of action arises. This section clarifies this point in time. For transfers of real estate, paragraph (1) fixes the time as the date of perfection against a good faith purchaser from the transferor. For transfers of fixtures and assets constituting personalty, the time is fixed under paragraph (1) as the date of perfection against a judicial lien creditor not asserting rights under this Act. Perfection typically is effected by notice-filing, recordation, or delivery of unequivocal possession. See AS 45.09.302, 45.09.304, and 45.09.305 (security interest in personal property perfected by notice-filing or delivery of possession to transferee); 4 American Law of Property §§ 17.10-17.12 (1952) (recordation of transfer or delivery of possession to grantee required for perfection against bona fide purchaser from grantor). The provision for postponing the time a transfer is made until its perfection is an adaptation of § 548(d)(1) of the Bankruptcy Code. When no steps are taken to perfect a transfer that applicable law permits to be perfected, the transfer is deemed by paragraph (2) to be perfected immediately before the filing of an action to avoid it; without such a provision to cover that eventuality, an unperfected transfer would arguably be immune to attack. Some transfers -- e.g., an assignment of a bank account, creation of a security interest in money, or execution of a marital or pre-marital agreement for the disposition of property owned by the parties to the agreement -- may not be amenable to perfection as against a bona fide purchaser or judicial lien creditor. When a transfer is not perfectible as provided in paragraph (1), the transfer occurs for the purpose of this Act when the transferor effectively parts with an interest in the asset as provided in AS 45.41.110(12), *infra*.

(2) Paragraph (4) requires the transferor to have rights in the asset transferred before the transfer is made for the purpose of this section. This provision makes clear that its purpose may not be circumvented by notice-filing or recordation of a document evidencing an interest in an asset to be acquired in the future. *Cf.* Bankruptcy Code § 547(e); AS 45.09.203(a)(3).

(3) Paragraph (5) is new. It is intended to resolve uncertainty arising from Rubin v. Manufacturers Hanover Trust Co., 661 F.2d 979, 989-91, 997 (2d Cir.1981), insofar as that case holds that an obligation of guaranty may be deemed to be incurred when advances covered by the guaranty are made rather than when the guaranty first became effective between the parties. Compare Rosenberg, Intercorporate Guaranties and the Law of Fraudulent Conveyances: Lender Beware, 125 U.Pa.L.Rev. 235, 256-57 (1976).

An obligation may be avoided as fraudulent under this Act if it is incurred under the circumstances specified in AS 34.41.030(a) or 34.41.040(a). The debtor may receive reasonably equivalent value in exchange for an obligation incurred even though the benefit to the debtor is indirect. See Rubin v. Manufacturers Hanover Trust Co., 661 F.2d at 991-92; Williams v. Twin City Co., 251 F.2d 678, 681 (9th Cir. 1958); Rosenberg, supra at 243-46.

Sec. 34.41.060. This section sets out the remedies available to creditors. The listing is not exclusive.

OFFICIAL COMMENTARY

(1) This section is derived from §§ 9 and 10 of the 1918 Act. Section 9 of that Act specified the remedies of creditors whose claims have matured, and § 10 enumerated the remedies available to creditors whose claims have not matured. A creditor holding an unmatured claim may be denied the right to receive payment for the proceeds of a sale on execution until the claim has matured, but the proceeds may be deposited in court or in an interest-bearing account pending the maturity of the creditor's claim. The remedies specified in this section are not exclusive.

(2) The availability of an attachment or other provisional remedy has been restricted by amendments of statutes and rules of procedure to reflect views of the United States Supreme Court expressed in Sniadach v. Family Finance Corp. of Bay View, 395 U.S. 337 (1969), and its progeny. This judicial development and the procedural changes that followed in its wake do not preclude resort to attachment by a creditor in seeking avoidance of a fraudulent transfer or obligation. See, e.g., Britton v. Howard Sav. Bank, 727 F.2d 315, 317-20 (3d Cir.1984); Computer Sciences Corp. v. Sci-Tek Inc., 367 A.2d 658, 661 (Del. Super. 1976); Great Lakes Carbon Corp. v. Fontana, 54 A.D.2d 548, 387 N.Y.S.2d 115 (1st Dep't 1976). Paragraph (a)(2) continues the authorization for the use of attachment contained in § 9(b) of the 1918 Act, or of a similar provisional remedy, when the state's procedure provides therefor, subject to the constraints imposed by the due process clauses of the United States and state constitutions.

(3) Subsections (a) and (b) of § 10 of the 1918 Act authorized the court, in an action on a fraudulent transfer or obligation, to restrain the defendant from

disposing of the defendant's property, to appoint a receiver to take charge of the property, or to make any order the circumstances may require. Section 10, however, applied only to a creditor whose claim was unmatured. There is no reason to restrict the availability of these remedies to such a creditor, and the courts have not so restricted them. See, e.g., Lipskey v. Voloshen, 155 Md. 139, 143-45, 141 Atl. 402, 404-05(1928) (judgment creditor granted injunction against disposition of property by transferee, but appointment of receiver denied for lack of sufficient showing of need for such relief); Matthews v. Schusheim, 36 Misc.2d 918, 922-23, 235 N.Y.S.2d 973, 976-77, 991-92 (Sup.Ct. 1962) (injunction and appointment of receiver granted to holder of claims for fraud, breach of contract, and alimony arrearages, whether creditor's claim was mature said to be immaterial); Oliphant v. Moore, 155 Tenn. 359, 362-63, 293 S.W. 541, 542 (1927) (tort creditor granted injunction restraining alleged tortfeasor's disposition of property).

(4) As under the 1918 Act, a creditor is not required to obtain a judgment against the debtor-transferor or to have a matured claim in order to proceed under subsection (a). See Sec. 34.41.110(3) & (4), *infra*; American Surety Co. v. Conner, 251 N.Y. 1, 166 N.E. 783, 65 A.L.R. 244 (1929); 1 G. Glenn, *Fraudulent Conveyances and Preferences* 129 (Rev.ed. 1940).

(5) The provision in subsection (b) for a creditor to levy execution on a fraudulently transferred asset continues the availability of a remedy provided in § 9(b) of the 1918 Act. See e.g., Doland v. Burns Lbr. Co., 156 Minn. 238, 194 N.W. 636 (1923); Montana Ass'n of Credit Management v. Hergert, 181 Mont. 442, 449, 453, 593 P.2d 1059, 1063, 1065 (1979); Corbett v. Hunter, 292 Pa.Super. 123, 128, 436 A.2d 1036, 1038 (1981); see also American Surety Co. v. Conner, 251 N.Y. 1, 6, 166 N.E. 783, 784, 65 A.L.R. 244, 247 (1929) ("In such circumstances he [the creditor] might find it necessary to indemnify the sheriff and, when the seizure was erroneous, assumed the risk of error"); McLaughlin, *Application of the Uniform Fraudulent Conveyance Act*, 46 Harv.L. Rev. 404, 441-42 (1933).

(6) The remedies specified in this section, like those enumerated in §§ 9 and 10 of the 1918 Act, are cumulative. Lind v. O. N. Johnson Co., 204 Minn. 30, 40, 282 N.W. 661, 667, 119 A.L.R. 940 (1939) (Uniform Fraudulent Conveyance Act held not to impair or limit availability of the "old practice" of obtaining judgment and execution returned unsatisfied before proceeding in equity to set aside a transfer); Conemaugh Iron Works Co. v. Delano Coal Co., Inc., 298 Pa. 182, 186, 148 A. 94, 95 (1929) (Uniform Fraudulent Conveyance Act held to give an "additional optional remedy" and not to "deprive a creditor of the right, as formerly, to work out his remedy at law"); 1 G. Glenn, *Fraudulent Conveyances and Preferences* 120, 130, 150 (Rev.ed. 1940).

Sec. 34.41.070. This section sets out the defenses available to, the potential liability of, and protections available for, a transferee.

OFFICIAL COMMENTARY

(1) Subsection (a) states the rule that applies when the transferee establishes a complete defense to the action for avoidance based on Sec. 34.41.030(a)(1). The subsection is an adaptation of the exception stated in § 9 of the 1918 Act. The person who invokes this defense carries the burden of establishing good faith and the reasonable equivalence of the consideration exchanged. Chorost v. Grand Rapids Factory Showrooms, Inc., 77 F.Supp. 276, 280 (D.N.J. 1948), affd 172 F.2d 327, 329 (3d Cir. 1949).

(2) Subsection (b) is derived from § 550(a) of the Bankruptcy Code. The value of the asset transferred is limited to the value of the leivable interest of the transferor, exclusive of any interest encumbered by a valid lien. See Sec. 34.41.110(2), *infra*.

The requirement of § 550(b)(1) of the Bankruptcy Code that a transferee be "without knowledge of the voidability of the transfer" in order to be protected has been omitted as inappropriate. Knowledge of the facts rendering the transfer voidable would be inconsistent with the good faith that is required of a protected transferee. Knowledge of the voidability of a transfer would seem to involve a legal conclusion. Determination of the voidability of the transfer ought not to require the court to inquire into the legal sophistication of the transferee.

(3) Subsection (c) is new. The measure of the recovery of a defrauded creditor against a fraudulent transferee is usually limited to the value of the asset transferred at the time of the transfer. See, e.g., United States v. Fetnon, 640 F.2d 609, 611 (5th Cir. 1981); Hamilton Nat'l Bank of Boston v. Halstead, 134 N.Y. 520, 31 N.E. 900 (1892); cf. Buffum v. Peter Barceloux Co., 289 U.S. 227 (1932) (transferee's objection to trial court's award of highest value of asset between the date of the transfer and the date of the decree of avoidance rejected because an award measured by value as of time of the transfer plus interest from that date would have been larger). The premise of subsection (c) is that changes in value of the asset transferred that occur after the transfer should ordinarily not affect the amount of the creditor's recovery. Circumstances may require a departure from that measure of the recovery, however, as the cases decided under the 1918 Act and other laws derived from the Statute of 13 Elizabeth illustrate. Thus, if the value of the asset at the time of levy and sale to enforce the judgment of the creditor has been enhanced by improvements of the asset transferred or discharge of liens on the property, a good faith transferee should be reimbursed for the outlay for such a purpose to the extent the sale proceeds were increased thereby. See Bankruptcy Code § 550(d); Janson v. Schier, 375 A.2d 1159, 1160 (N.H. 1977), Anno. 8 A.L.R. 527 (1920). If the value of the asset has been diminished by severance and disposition of timber or minerals or fixtures, the transferee should be liable for the amount of the resulting reduction. See Damazo v. Wahby, 269 Md. 252, 257, 305 A.2d 138, 142 (1973). If the transferee

has collected rents, harvested crops, or derived other income from the use or occupancy of the asset after the transfer, the liability of the transferee should be limited in any event to the net income after deduction of the expense incurred in earning the income. Anno., 60 A.L.R.2d 593 (1958). On the other hand, adjustment for the equities does not warrant an award to the creditor of consequential damages alleged to accrue from mismanagement of the asset after the transfer.

(4) Subsection (d) is an adaption of § 548(c) of the Bankruptcy Code. An insider who receives property or an obligation from an insolvent debtor as security for or in satisfaction of an antecedent debt of the transferor or obligor is not a good faith transferee or obligee if the insider has reasonable cause to believe that the debtor was insolvent at the time the transfer was made or the obligation was incurred.

(5) Paragraph (e)(1) rejects the rule adopted in Darby v. Atkinson (*In re Farris*), 415 F.Supp. 33, 39-41 (W.D.Okla. 1976) that termination of a lease on default in accordance with its terms and applicable law may constitute a fraudulent transfer. Paragraph (e)(2) protects a transferee who acquires a debtor's interest in an asset as a result of the enforcement of a secured creditor's rights pursuant to and in compliance with the provisions of Part 5 of Article 9 of the Uniform Commercial Code (AS 45.09.501 - 45.09.507). Cf. Calaiaro v. Pittsburgh Nat'l Bank (*In re Ewing*), 33 B.R. 288, 9 C.B.C.2d 526, CCH B.L.R. ¶ 69,460 (Bk.W.D.Pa. 1983) (sale of pledged stock held subject to avoidance as fraudulent transfer in § 548 of the Bankruptcy Code), rev'd, 36 E.R. 476 (W.D.Pa. 1984) (transfer held not voidable because deemed to have occurred more than one year before bankruptcy petition filed). Although a secured creditor may enforce rights in collateral without a sale under AS 45.09.502 or 45.09.505, the creditor must proceed in good faith (AS 45.09.103) and in a "commercially reasonable" manner. The "commercially reasonable" constraint is explicit in AS 45.09.502(b) and is implicit in AS 45.09.505. See 2 G. Gilmore, Security Interests in Personal Property 1224-27 (1965).

(6) Subsection (f) provides additional defenses against the avoidance of a preferential transfer to an insider under Sec. 34.41.040(b).

Paragraph (f)(1) is adapted from § 547(c)(4) of the Bankruptcy Code, which permits a preferred creditor to set off the amount of new value subsequently advanced against the recovery of a voidable preference by a trustee in bankruptcy to the debtor without security. The new value may consist not only of money, goods, or services delivered on unsecured credit but also of the release of a valid lien. See e.g., In re Ira Haupt & Co., 424 F.2d 722, 124 (2d Cir. 1970); Baranow v. Gibraltar Factors Corp. (*In re Hygrade Envelope Co.*), 393 F.2d 60, 65-67 (2d Cir.), cert. denied, 393 U.S. 837 (1968); In re John Morrow & Co., 134 F. 686, 688 (S.D.Ohio 1901). It does not include an obligation substituted for a prior obligation. If the insider receiving the preference thereafter extends new credit to the debtor but also

takes security from the debtor, the injury to the other creditors resulting from the preference remains undiminished by the new credit. On the other hand, if a lien taken to secure the new credit is itself voidable by a judicial lien creditor of the debtor, the new value received by the debtor may appropriately be treated as unsecured and applied to reduce the liability of the insider for the preferential transfer.

Paragraph (f)(2) is derived from § 547(c)(2) of the Bankruptcy Code, which excepts certain payments made in the ordinary course of business or financial affairs from avoidance by the trustee in bankruptcy as preferential transfers. Whether a transfer was in the "ordinary course" requires a consideration of the pattern of payments or secured transactions engaged in by the debtor and the insider prior to the transfer challenged under Sec. 34.41.040(b). See Tait & Williams, *Bankruptcy Preference Laws: The Scope of Section 547(c)(2)*, 99 *Banking L.J.* 55, 63-66 (1982). The defense provided by paragraph (f)(2) is available, irrespective of whether the debtor or the insider or both are engaged in business, but the prior conduct or practice of both the debtor and the insider-transferee is relevant.

Paragraph (f)(3) is new and reflects a policy judgment that an insider who has previously extended credit to a debtor should not be deterred from extending further credit to the debtor in a good faith effort to save the debtor from a forced liquidation in bankruptcy or otherwise. A similar rationale has sustained the taking of security from an insolvent debtor for an advance to enable the debtor to stave off bankruptcy and extricate itself from financial stringency. *Blackman v. Bechtel*, 80 F.2d 505, 508-09 (8th Cir. 1935); *Olive v. Tyler (In re Chelan Land Co.)*, 257 F. 497, 5 A.L.R. 561 (9th Cir. 1919); *In re Robin Bros. Bakeries, Inc.*, 22 F.S. 662, 663-64 (N.D.III. 1937); see *Dean v. Davis*, 242 U.S. 438, 444 (1917). The amount of the present value given, the size of the antecedent debt secured, and the likelihood of success for the rehabilitative effort are relevant considerations in determining whether the transfer was in good faith.

Sec. 34.41.080. This section makes it clear that failure to take action within the statutory time limits bars the right of action.

OFFICIAL COMMENTARY

(1) This section is new. Its purpose is to make clear that lapse of the statutory periods prescribed by the section bars the right and not merely the remedy. See Restatement of Conflict of Laws 2d § 143 Comments (b) & (c) (1971). The section rejects the rule applied in *United States v. Gleneagles Inv. Co.*, 565 F.S. 556, 583 (M.D.Pa. 1983) (state statute of limitations held not to apply to action by United States based on Uniform Fraudulent Conveyance Act).

(2) Statutes of limitations applicable to the avoidance of fraudulent transfers and obligations vary widely from state to state and are frequently subject to

uncertainties in their application. See Hesson, *The Statute of Limitations in Actions to Set Aside Fraudulent Conveyances and in Actions Against Directors by Creditors of Corporations*, 32 Cornell L.Q. 222 (1946); Annos., 76 A.L.R. 864 (1932), 128 A.L.R. 1289 (1940), 133 A.L.R. 1311 (1941), 14 A.L.R.2d 598 (1950), and 100 A.L.R.2d 1094 (1965). Together with Sec. 34.41.050, this section should mitigate the uncertainty and diversity that have characterized the decisions applying statutes of limitations of actions to fraudulent transfers and obligations. The periods prescribed apply, whether the action under this Act is brought by the creditor defrauded or by a purchaser at a sale on execution levied pursuant to Sec. 34.41.060(b) and whether the action is brought against the original transferee or subsequent transferee. The prescription of statutory periods of limitation does not preclude the barring of an avoidance action for laches. See Sec. 34.41.090 and the accompanying comment, *infra*.

Sec. 34.41.090. This section provides that other applicable principles of law supplement the provisions of this chapter.

OFFICIAL COMMENTARY

This section is derived from § 11 of the 1918 Act and § 1-103 of the Uniform Commercial Code (AS 45.01.103). The section adds a reference to "laches" in recognition of the particular appropriateness of the application of this equitable doctrine to an untimely action to avoid a fraudulent transfer. See Louis Dreyfus Corp. v. Butler, 496 F.2d 806, 808 (6th Cir. 1974) (action to avoid transfers to debtor's wife when debtor was engaged in speculative business held to be barred by laches or applicable statutes of limitations); Cooch v. Grier, 30 Del.Ch. 255, 265-66, 59 A.2d 282, 287-88 (1948) (action under the Uniform Fraudulent Conveyance Act held barred by laches when the creditor was chargeable with inexcusable delay and the defendant was prejudiced by the delay).

Sec. 34.41.100. This section is the standard statement of the purpose of a uniform law and serves as a guide to courts that may be interpreting the law.

Sec. 34.41.110. This section sets out the definitions for the chapter.

OFFICIAL COMMENTARY

(1) The definition of "affiliate" is derived from § 101(2) of the Bankruptcy Code.

(2) The definition of "asset" is substantially to the same effect as the definition of "assets" in § 1 of the 1918 Act. The definition in this Act, unlike that in the earlier Act, does not, however, require a determination that the property is liable for the debts of the debtor. Thus, an unliquidated claim for damages resulting from personal

injury or a contingent claim of a surety for reimbursement, contribution, or subrogation may be counted as an asset for the purpose of determining whether the holder of the claim is solvent as a debtor under Sec. 34.41.010, although applicable law may not allow such an asset to be levied on and sold by a creditor. Cf. Manufacturers & Traders Trust Co. v. Goldman (In re Ollag Construction Equipment Corp.), 578 F.2d 904, 907-09 (2d Cir.1978).

Subparagraphs (2)(A) - (C) provide clarification by excluding from the term not only generally exempt property but also an interest in a tenancy by the entirety in many states and an interest that is generally beyond reach by unsecured creditors because subject to a valid lien. This Act, like its predecessor and the Statute of 13 Elizabeth, declares rights and provides remedies for unsecured creditors against transfers that impede them in the collection of their claims. The laws protecting valid liens against impairment by levying creditors, exemption statutes, and the rules restricting leviability of interest in entireties property are limitations on the rights and remedies of unsecured creditors, and it is therefore appropriate to exclude property interests that are beyond the reach of unsecured creditors from the definition of "asset" for the purposes of this Act.

A creditor of a joint tenant or tenant in common may ordinarily collect a judgment by process against the tenant's interest, and in some states a creditor of a tenant by the entirety may likewise collect a judgment by process against the tenant's interest. See 2 American Law of Property 10, 22, 28-32 (1952); Craig, An Analysis of Estates by the Entirety in Bankruptcy, 98 Am.Bankr. L.J. 255, 258-59 (1974). The leviable interest of such a tenant is included as an asset under this Act.

The definition of "assets" in the 1918 Act excluded property that is exempt from liability for debts. The definition did not, however, exclude all property that can not be reached by a creditor through judicial proceedings to collect a debt. Thus, it included the interest of a tenant by the entirety although in nearly half the states such an interest can not be subjected to liability for a debt unless it is an obligation owned jointly by the debtor with the debtor's cotenant by the entirety. See 2 American Law of Property 29 (1952); Craig, An Analysis of Estates by the Entirety in Bankruptcy, 48 Am.Bankr.L.J. 255, 258 (1974). The definition in this Act requires exclusion of interests in property held by tenants by the entirety that are not subject to collection process by a creditor without a right to proceed against both tenants by the entirety as joint debtors.

The reference to "generally exempt" property in subparagraph (2)(B) recognizes that all exemptions are subject to exceptions. Creditors having special rights against generally exempt property typically include claimants for alimony, taxes, wages, the purchase price of the property, and labor or materials that improve the property. See Uniform Exemptions Act § 10 and the accompanying Comment. The fact that a particular creditor may reach generally exempt property by resorting to

differs from the definition in the Bankruptcy Code in omitting the reference in 11 U.S.C. 101(28)(D) to an elected official or relative of such an official as an insider of a municipality. As in the Bankruptcy Code (see 11 U.S.C. 102 (3)), the word "includes" is not limiting, however. See also AS 01.10.040(b). Thus, a court may find a person living with an individual for an extended time in the same household or as a permanent companion to have the kind of close relationship intended to be covered by the term "insider." Likewise, a trust may be found to be an insider of a beneficiary.

(8) The definition of "lien" is derived from paragraphs (30), (31), (43), and (45) of § 101 of the Bankruptcy Code, which define "judicial lien," "lien," "security interest," and "statutory lien" respectively.

(9) The definition of "person" is adapted from paragraphs (28) and (30) of § 1-201 of the Uniform Commercial Code (AS 45.01.201(29) and (31) in the Alaska Statutes), defining "organization" and "person" respectively, and has been modified to incorporate by reference those items already provided for in AS 01.10.060.

(10) The definition of "property" is derived from § 1-201(33) of the Uniform Probate Code (AS 13.06.050(33) in the Alaska Statutes). Property includes both real and personal property, whether tangible or intangible, and any interest in property, whether legal or equitable.

(11) The definition of "relative" is derived from § 101(37) of the Bankruptcy Code but is explicit in its references to the spouse of a debtor in view of uncertainty as to whether the common law determines degrees of relationship by affinity.

(12) The definition of "transfer" is derived principally from § 101(48) of the Bankruptcy Code. The definition of "conveyance" in § 1 of the 1918 Act was similarly comprehensive and the references in this Act to "payment of money, release, lease, and the creation of a lien or incumbrance" are derived from the 1918 Act. While the definition in the 1918 Act did not explicitly refer to an involuntary transfer, the decisions under that Act were generally consistent with an interpretation that covered such a transfer. See, e.g. Hearn 45 St. Corp. v. Jano, 283 N.Y. 139, 27 N.E.2d 814, 128 A.L.R. 1285 (1940) (execution and foreclosure sales); Lefkowitz v. Finkelstein Trading Corp., 14 F.Supp. 898, 899 (S.D.N.Y. 1936) (execution sale); Langan v. First Trust & Deposit Co., 277 App.Div. 1090, 101 N.Y.S.2d 36 (4th Dept. 1950), aff'd 302 N.Y. 932, 100 N.E.2d 189 (1951) (mortgage foreclosure); Catabene v. Wallner, 16 N.J.Super. 597, 602, 85 A.2d 300, 302 (1951) (mortgage foreclosure).

(13) The definition of "valid lien" is new. A valid lien includes an equitable lien that may not be defeated by a judicial lien creditor. See, e.g., Pearlman v. Reliance Insurance Co., 371 U.S. 132, 136 (1962) (upholding a surety's equitable lien in respect to a fund owing a bankrupt contractor).

Representative Brian .ter
January 21, 1994
Page 26

Sec. 34.41.120. The short title by which the chapter may be cited.

Sec. 2. Repeals the existing Alaska law on fraudulent conveyances generally (AS 34.40).

If I may be of further assistance, please advise.

DRD:pl
94-052.plm

FISCAL NOTE

STATE OF ALASKA
1994 LEGISLATIVE SESSION

BILL NO. HB439

Revision Date: 2/28/94
Title: "Uniform Fraudulent Transfer Act"
Sponsor: House Judiciary Committee
Requestor: House Labor and Commerce

Department Affected: Commerce and Economic Development
BRU: Banking & Corporations
Component: Banking

COMPONENT SERIAL NO. _____

Expenditures/Revenues:

OPERATING EXPENDITURES	FY 95	FY 96	FY 97	FY 98	FY 99	FY 00
PERSONAL SERVICES	0	0	0	0	0	0
TRAVEL	0	0	0	0	0	0
CONTRACTUAL	0	0	0	0	0	0
SUPPLIES	0	0	0	0	0	0
EQUIPMENT	0	0	0	0	0	0
LAND & STRUCTURES	0	0	0	0	0	0
GRANTS, CLAIMS	0	0	0	0	0	0
MISCELLANEOUS	0	0	0	0	0	0
TOTAL OPERATING	0	0	0	0	0	0

CAPITAL EXPENDITURES	0	0	0	0	0	0
-----------------------------	---	---	---	---	---	---

CHANGE IN REVENUES ()	0	0	0	0	0	0
-------------------------------	---	---	---	---	---	---

FUND SOURCE

1002 Federal Receipts	0	0	0	0	0	0
1003 GF Match	0	0	0	0	0	0
1004 GF	0	0	0	0	0	0
1005 GF/Program Receipts	0	0	0	0	0	0
1006 GF/MHTIA	0	0	0	0	0	0
Other	0	0	0	0	0	0
TOTAL	0	0	0	0	0	0

Estimate of current year (FY 94) cost: \$ 0

POSITIONS

FULL-TIME	0	0	0	0	0	0
PART-TIME	0	0	0	0	0	0
TEMPORARY	0	0	0	0	0	0

ANALYSIS: (Attach a separate page if necessary.)

Prepared by: Larry Carroll
Division: Division of Banking and Securities

Phone: _____
Date: _____

Approved by Commissioner: Paul Fuhs
Agency: Commerce and Economic Development

Date: 2/28/94

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(907) 465-2693

Representative Gary L. Davis

SPONSOR STATEMENT

HOUSE BILL 453

"An Act amending the motor fuel tax to establish a different tax levy on residual fuel oil used in and on watercraft; and providing for an effective date."

House Bill 453 is simple, straight forward legislation. HB 453 will attempt to create an equal playing field between Alaska's residual fuel oil industry and their counterparts in the Lower 48 and Canada.

Residual fuel oil is the residue from crude oil after the light oils, gasoline, naphtha, kerosine, and mid-distillates are extracted in the refining process. The only applications for residual fuel oil in Alaska are asphalt, cruise ship fuel and reinjection into the pipeline.

This product is subject to the State's motor fuel tax. The tax rate for residual fuel oil is five cents per gallon.

As a result of the current rate of taxation on this product, Alaska's residual fuel oil is automatically non-competitive with the same product available elsewhere. The cruise ship industry is the prime potential market for this fuel oil. However, even though many ships cruise Alaska waters during the summer, minimal quantities of this extremely tax sensitive fuel oil are purchased in Alaska. Consequently the state receives minimal revenue from the tax.

House Bill 453 will reduce the tax rate levied on the sale of residual fuel oil, which will stimulate sales of residual fuel oil and benefit Alaska's economy. This legislation will increase job opportunities in the trucking and fuel industries. Simultaneously, state revenues will likely remain consistent and possibly increase.

Alaska State Legislature


Interim:
P.O. Box 1287
Soldotna, AK 99669
(907) 262-8414

Session:
State Capitol
Juneau, AK 99801
(907) 465-2693

Representative Gary L. Davis

MEMORANDUM

TO: Representative Bill Hudson, Chairman
House Labor & Commerce Committee

FROM: Representative Gary L. Davis 

DATE: March 4, 1994

RE: HB 453, "An Act amending the motor fuel tax to establish a different tax levy on residual fuel oil used in and on watercraft; and providing for an effective date."

I respectfully request that House Bill 453 be scheduled for a hearing before the Labor & Commerce Committee at your earliest convenience. Thank you for considering this legislation.

Senate Bill No. 327
Statement of Legislative Intent
March 8, 1994

S.B. 327 lowers the tax rate on marine bunker fuel from \$0.05 to \$0.015 per gallon in an effort to establish a new Alaska market. Over 98.5% of bunker fuel produced in Alaska is exported to Japan or the West Coast from Tesoro's Kenai refinery. The \$0.05 per gallon tax prevents Alaska from servicing the cruise ship business, as bunker fuel is available at other locations at lower prices.

Total Bunker Sales: Impact on Bill's Financial Neutrality

A critical factor evaluated has been whether or not there will be sufficient sales volume increases to offset the lower tax rate. There were 12 million gallons of taxable bunker fuel sold during 1993 in Alaska. Tesoro accounted for 2/3's this amount, using the product as bunker fuel for its tankers, and for sales to other transport tankers. Alaska's 1993 sales generated approximately \$600,000 in marine bunker fuel taxes. A reduction to \$0.01 would have reduced the tax income by \$480,000 which translates into a need for 50 Million more gallons of product sales to retain revenue neutrality. (Note: The total in-state bunker fuel sales in 1993 represent only 1.47% of the total produced in-state. Source: Tesoro Alaska Petroleum Company).

Opportunity for New Market Development

Petro Marine Services has projected an expanded bunker fuel market from the cruise ship industry if the current tax is lowered to \$0.015. The expected volumes are sufficient to offset the lower tax rate provided by this bill making it revenue neutral as it relates to the tourist ship business.

Sale of Bunker to Tanker Ships

During the 5 years (189-1993) years, the average usage was 5.8 MM gallons ranging from as little as 1 MM gallons (1990) to 7.1 MM gallons (1991). Based on the five year average, the lower tax rate of \$0.015 would require an additional 15 Million or more gallons of bunker sales per year to remain revenue neutral. Tesoro does not expect to experience such an increase, even if the tax rate is reduced. This would be equivalent to approximately \$225,000 in lost taxes from bunkering tankers not in the cruise ship category. This does not take into account the economic benefit from the 12 new seasonal jobs created; sales and property taxes; a major investment in facilities at Seward; and increased freight transportation business in the region. It is unclear whether these benefits will offset the loss in revenue from a reduction in tax rates to the tanker bunkering market.

Legislative Intent

If SB 327 is enacted with a tax reduction applicable only to cruise ships, a bill sunset is expected. It is the intent of the legislature to reexamine this issue prior to the law's sunset to determine if the sales volumes have met those projected, and to evaluate the extension of the lower tax rate to the remaining bunker fuel customers, subject to identification of offsetting tax revenue, and or other tangible benefits, generated by the total bunker fuel sales to tour ships, tankers, and other users.

RESIDUAL FUEL SPECIFICATIONS: THE DEFINITION IN HOUSE BILL 453 AND SENATE BILL 327 INTENDS TO REFER TO ANY SHIPS BUNKER THAT IS A BLEND USING RESIDUAL FUEL OIL. UNFORTUNATELY LIKE A CASTLE, ONE MAN'S BUNKER OIL IS NOT THE SAME AS ANOTHER. THERE ARE MORE THAN ONE SET OF STANDARDS FOR ENGINE OILS:

- INTERNATIONAL COUNCIL ON COMBUSTION ENGINES (CIMAC)
- BRITISH STANDARDS INSTITUTE (BSI)
- INTERNATIONAL STANDARDS ORGANIZATION (ISO)

ONE OF MANY STANDARDS GENERALLY USED TO GRADE FUELS IS ITS VISCOSITY. ONE OF THE INDUSTRY GRADING STANDARDS IS KINEMATIC VISCOSITY MEASURED IN WHAT IS CALLED CENTISTOKES (CST). THIS IS A MEASURE OF THE NUMBER OF SECONDS IT TAKES FOR A FUEL TO PASS THROUGH A STANDARD DEVICE UNDER CONTROLLED TEMPERATURES.

THE TYPE OF FUELS THAT WOULD BE COVERED BY THIS NEW LEVY ARE FUELS THAT ARE THE RESULT OF BLENDING RESIDUAL FUEL OIL WITH A DIESEL OR OTHER VISCOSITY BREAKER. THE RESULTING FUEL WILL ALWAYS HAVE A VISCOSITY GREATER THAN NO1 OR NO2 DIESEL. THE FOLLOWING ARE THE GENERALLY ACCEPTED INTERNATIONAL STANDARDS FOR THE FUELS WE ARE TALKING ABOUT.

PRODUCT	KINEMATIC VIS IN CST		
	MIN	MAX	
NO2 DIESEL (CALLED MARINE GAS OIL IN THE MARINE FIELD)	1.9	4.1	SOLD IN ALASKA AS HEATING FUEL, MARINE DIESEL
NO1 DIESEL	1.3	2.4	SOLD IN ALASKA AS HEATING FUEL
MARINE FUELS GRADE DMB	2.5	11	CALLED MARINE GASOIL IN MARINE FIELD
DMC	-	14	
RMA-10	6.0	10	
RML-55	-	55	
GAS TURBINE FUEL OILS 3-GT 4-GT			
FUEL OILS GRADE NO. 4	5.5	24	SOMETIMES CALLED HAGO
FUEL OILS GRADE NO. 5	58	168	
FUEL OILS GRADE NO. 6	92	-	CALLED NO6, RESIDUAL FUEL

THE SHIPS BUNKERS THAT PETRO MARINE SELLS IN SEWARD ARE SOLD ON VISCOSITY RATING. THE TABLE BELOW SHOWS THE AMOUNT OF NO2 DIESEL BLENDED WITH RESIDUAL FUEL OIL TO ACHIEVE REQUESTED VISCOSITY.

REQUESTED SHIP BUNKER	% OF DIESEL
100 CST	25
160 CST	19
380 CST	8
420 CST	7
900 CST	0

PETRO MARINE SERVICES

MAR 09 '94 09:23AM PETRO MARINE ANCH

A PROPOSAL
TO DEVELOP AN ALASKAN MARKET
FOR BUNKER FUEL

PREPARED MAY 1993

PETRO MARINE SERVICES

Petroleum Marketing to the Marine Industry

This is an economic development proposal which could result in the following benefits to the State of Alaska:

1. Creation of approximately eleven full-time jobs in Seward (eight seasonal drivers May through September, two dock watch operators, and one operations supervisor), plus three jobs in Kenai,
2. Increased commercial trucking activity at 60,000 metric tons or approximately 17,000,000 gallons equal 18 to 20 loads daily from May 15 until September 15,
3. Capital investment totalling \$1.2 million at Seward, \$50,000 at Kenai, plus \$800,000 Weaver Brothers tank truck and trailers,
4. Development of an in-state market for Tesoro residual bunker fuel from the Kenai refinery. This will improve the economics over Tesoro's current Japanese export sales, and will assist consumers by stabilizing Tesoro refined products' cost. (This results from Tesoro being able to market residual oil domestically in place of exporting to foreign customers at a price significantly less than crude cost),
5. Provide the incentive for the cruise industry to fuel in Alaska as opposed to foreign ports, primarily Vancouver, B.C.

I. BACKGROUND

Cruise ships visiting Alaska utilize a very low grade of fuel oil for propulsion. This fuel is referred to as "bunker fuel," which can be handled most efficiently in the Alaskan climate during the summer months.

Currently, the Kenai Tesoro refinery exports its residual bunker fuel overseas to markets in Japan. There is currently no in-state market or use for bunker fuels.

The cruise industry has historically met its demands for bunker fuel by purchasing in Vancouver, B.C., and Seattle. Their prices are established off Seattle postings regardless of where they take physical delivery.

With the increase in cruise traffic to Southeast and South Central Alaska, Petro marine Services has undertaken a determined effort to develop a market in Alaska with the cruise industry utilizing the Tesoro bunker fuel, which otherwise would be shipped overseas.

This effort has resulted in serious negotiations with Princess Cruise Lines and other carriers.

PETRO MARINE SERVICES

-2-

II. ECONOMIC BENEFITS

If Princess or other cruise lines agree to purchase the bunker fuel in Alaska, this would result in capital development and construction investment amounting to about \$2.1 million. (In Seward, it would mean \$1.2 million and three jobs. In Kenai, it would mean \$500,000 in capital improvements.

The product would be loaded on tanker trucks in Kenai and transported to Seward.

The volume for all vessels calling in Seward is in excess of 60,000 metric tons or approximately 17,000,000 gallons annually. This volume is expected to increase in future years and the trend is toward larger vessels carrying more people.

III. PROBLEM

The current Alaska state motor fuel tax of \$0.05/gallon is a significant impediment to gaining the full potential of residual fuel oil volume available at Seward.

We feel that the bulk of the tour boat fuel business calling in Seward could be served from an Alaskan source if we can get our pricing within a competitive range versus Vancouver, B.C.

Current history is show in Exhibit 1. As you can see, on average, Seward is \$0.0897/gallon out of line with the Vancouver alternate. Five cents per gallon of that difference is the Alaska State tax. Discussions with potential buyers have indicated that if we can get close to the Vancouver pricing, we will get the fuel business. Exhibit 2 graphs the fluctuations in that price differential.

Relief of the tax could bring in more than five times the volume as the Seward price is made competitive with Vancouver.

The vastly increased volume will mean economics of scale in:

- o product cost
- o freight
- o amortization of investment

This means the supplier can look at sharing those economies with the customer and get very close to Vancouver economies. We can sell the remaining difference with superior service and product quality. (See attached Exhibits 1, 2 and 3.)

PETRO MARINE SERVICES

Petroleum Marketing to the Marine Industry

"BUNKER FUEL" IS DISTINCT IN CHARACTER AND USAGE FROM MOTOR FUEL.

-3-

Bunker fuels are known in the refining industry as residual fuel oil. They are, just as the name implies, the residue of the refining process. When all of the desirable and profitable fuels, i.e., gasolines, jet fuel, diesel, and heating oil have been removed, that is what is left.

Crude oils vary in chemical make-up and the yield and quality of residual fuel may differ greatly from one to another. We have an excellent example right here in Alaska;

Cook Inlet crude, of which there is very limited supply, will yield approximately 28.5% residual fuel oil with a sulphur content of 0.3%. It is a very desirable crude for this reason, but there is simply not enough available supply.

North Slope crude, which is still available in great abundance, will yield 48% residual fuel oil with a sulphur content of 2.5%. Unfortunately, to have almost half of every barrel you refine ends up as a low quality fuel for which there traditionally has been no local market, is a tremendous economic detriment for any company to bear. Certainly Tesoro's earnings have reflected these economic realities since the mid 1980's when it switched to Alaska North Slope crude as its primary feed stock.

The question might be asked: Why is there no local market for this product? It is because the fuel is normally used in large scale applications which can afford to invest in the equipment to handle this viscous and "difficult to burn" material. Pumping and handling of bunker fuel will require the maintenance of tank and pipeline temperatures of at least 120 degrees F. Atomization for proper combustion will require approximately 200 degrees F.

Typically, the fuel is used in utilities for the production of steam to turn turbines and produce electricity. Other large applications are paper mills, steel mills, and chemical plants. We have little manufacturing base in the state and most of those that do exist are well served by convenient natural gas supplies.

PETRO MARINE SERVICES

THE ECONOMIC OPPORTUNITY

We have before us now a rare opportunity to develop a market for a product which is, currently, an economic liability to one of two major in-state refiners. While the volume is no quantum leap solution, it is a beginning to a market that clearly has the potential to expand.

If we are able to achieve price competitiveness, there is no reason that we cannot fuel the coal ships calling in Seward or the LNG and crude vessels at Kenai. This potential new business opportunity need not be limited to cruise vessels.

To summarize, bunker or residual fuel oil is not a motor fuel by industry definition. ASTM designation and "The Manual of Oil and Gas Terms" both define this product as heavy, high viscosity oil used primarily in industry, in large commercial buildings, and for the generation of electricity.

FINAL REPORT
OF THE
GOVERNOR'S TASK FORCE
ON
REGULATORY REFORM

MARCH 19, 1993

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OIL

SI 9. Propose a statutory or regulatory change to make marketing of heavy fuels (heavy bunker oil) more economically competitive by eliminating or reducing the taxes. Statutory reference AS 43.40.1 - May be possible to do by regulation.

Due to the excessive tax on heavy fuels if used instate (§2.10), heavy fuels have no instate sales/useage. In 1970-72, heavy bunker fuel was sold, to a small market, for use instate, by such firms as Sealand. In 1972, the present tax was placed on this fuel. All sales then ceased, and have remained non-existent since that date. Currently, there is the potential for a market of these fuels in Alaska, if the price of the fuel can be competitive with prices in Canada (current fuel source). The initial potential is for annual sales of \$7,000,000, and employment for 7-10 Alaskans. Refineries instate do produce the heavy bunker fuel, and then it sell as an exported product.

MINING

SI 10. Change the valid timeframe of an Exploration and Reclamation permit from one year to five years (DNR). 11 AAC 97.300

Currently permits are only good for one year, and require considerable effort and expense in preparation. Exploration and reclamation themselves are likely to span several years. Requiring firms to file anew each year is an unnecessary additional expense both for the business enterprise and the State, which does not contribute to either the applicant or ADNR.

If ADNR is seeking updated information on changes, then alter the regulations to require notification of any changes when and if changes occur from those in the original approved permit.

SI 11. Add a phrase to 18 AAC 80.020 so that it reads: "Toxic and Other Deleterious Organic and Inorganic Substances -Substances shall not exceed Alaska Drinking Water Standards (18 AAC 80) or EPA Quality Criteria for Water as applicable to substances and use, i.e., if the water is not used as a public water system. 18 AAC 80.020 Source Protection is not the applicable use."

This is recommended in order to get away from effective treated water at the source. As a result, "raw water" prior to treatment would not have to meet the same standards as water taken and treated for public consumption.

PRINCESS CRUISES 

EST

FINAL
cc Kurt Dawson
Fy I

11111
Santa Monica
Boulevard
Los Angeles,
California
90047-4140
California
910 351-1700
Telex
TAT 104172
Telefax
910 277-5175

February 28, 1994
Ref: SAN/cjt #1612

Mr. Jim Burns
Petro Marine
3111 C Suite 400
Anchorage, Alaska 99503

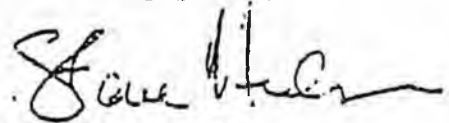
Dear Jim,

Princess Cruises operates 6 cruise vessels in the Alaska cruise trade from June through September each year. Five of these vessels are based in Vancouver and one in San Francisco. Of the 5 Vancouver based vessels, 3 operate 7 day cruises across the Gulf of Alaska between Vancouver and Seward and 2 operate 7 day cruises round trip from Vancouver through the inside passage of Alaska. That San Francisco based vessel operates 10 day round trip cruises to the inside passage of Alaska. Alaska ports of call include Ketchikan, Juneau, Skagway, Sitka and Seward.

We purchase the fuel oil for our ships based upon quality and price. Fuel oil purchased in Vancouver is essentially the same quality as that available in San Francisco, Seattle and Seward. The price differential, due to the Alaska state motor fuel tax is, however significant. The tax of \$0.05 per gallon, which is approximately equal to \$13.65 per ton, makes it prohibitive to purchase more than the minimum required in Seward to return to Vancouver. Our total requirements for the 1994 Alaska cruises season will be approximately 17,855 tons (15,680,000 gallons) for the 6 vessels. Of this amount we anticipate purchasing approximately 9,490 tons (2,561,000 gallons) in Seward.

We strongly support the proposal to reduce the Alaska state motor fuel tax to \$0.01 per gallon. This would make the cost of fuel oil in Alaska competitive with that in Vancouver. This would encourage greater purchase of fuel oil in Alaska.

Very truly yours,



Stephen A. Nielsen



Crown Cruise Line

February 18, 1994
L94057aa

VIA FAX: 907-561-6500

Petro Marine Services
Attn: James S. Burns
Anchorage, Alaska

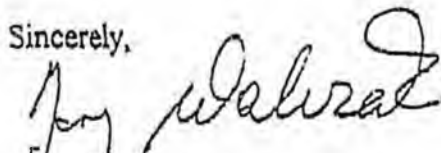
Dear Mr. Burns:

We operate the MS CROWN DYNASTY whose summer itinerary has her sailing from Vancouver throughout Alaska.

While researching available bunkering ports, we understand the Alaska Marine Tax of five-cents per gallon is currently in effect. We understand Petro Marine Services is leading the way to have the tax reduced from 5 cents to 1 cent; we would like to lend our support to this effort and advise that such a reduction would play a key role in our decision to bunker in Alaska rather than relying solely on Vancouver as the primary bunker station.

Thank you for including our formal letter of support in this reduction effort's dossier.

Sincerely,



Captain Jorg Walczak
Director, Marine Operations

JW:aa

cc: P. Grant, Sr. VP Operations



Holland America Line
Westours Inc.

Mr. James S. BURNS
Petro Marine Services
3111 'C' Street Suite 500
Anchorage AK. 99503

To fax : (907) 561-6500

Seattle February 16 1994

Dear Mr. Burns

It was a pleasure meeting you Wednesday for what turned out to be a very interesting discussion. You informed me that you are currently working with others in the Marine Industry to have legislation introduced that would reduce the current tax on marine fuel in Alaska from 5 cents per gallon to 1 cent. If successful, this would immediately reduce the price for Intermediate Bunker fuel with approximately \$ 10.00 per Metric Ton and this would allow Seward and other Alaskan ports to offer shipowners an additional or alternative bunker choice on the U.S. West Coast and British Columbia.

It is with this possibility in mind, that I express my appreciation and support for your continued efforts in this matter, which in my opinion will greatly benefit not only the Marine Industry but increasingly so, the people and the state of Alaska.

Very truly yours

Captain Willem A. KOOPMAN
Director Marine Operations WSC
HOLLAND-AMERICA LINE-WESTOURS Inc.

c.c. D. Grausz



03 MAR '94 01:27 PM PF

MARINE ANCH

REGENCY CRUISE

P. 1001/001



REGENCY CRUISES

March 1, 1994

Mr. James S. Burns
PETRO MARINE SERVICES
3111 "C" Street
Suite 500
Anchorage, AK 99503

Dear Mr. Burns:

As I indicated during our meeting last month, Regency will deploy two vessels in Alaska during the summer of 94 and I am please to tell you we will add a third ship in 1995.

While at present, bunkering takes place in Vancouver every two weeks, we are very much interested in your proposal to bunker in Seward.

However we must tell you that in order to stay competitive with Vancouver's price, serious consideration must be given to reduce the current "motor fuel tax" to a more realistic figure.

To give you an indication of our bunkering needs, on an average the Regent Sea bunkers 450 M/T of IFO 180 and 150 M/T of MDO, the Regent Star 450 M/T of IFO 100 and 130 M/T of MDO every two weeks.

We look forward to doing business with you hopefully in the very near future.

Sincerely,
REGENCY CRUISES

Andrew K. Horton
Manager - Port Operations

AKH/GG

TESORO BUNKER FUEL SALES
FIVE YEARS (1989 - 1993)

◆ ◆ GALLONS ◆ ◆

YEAR	TESORO SHIPS	OTHER SALES	TOTAL
1989	2,909,928	0	2,909,928
1990	1,054,410	0	1,054,410
1991	7,167,048	0	7,167,048
1992	5,273,814	0	5,273,814
1993	8,566,782	4,219,404	12,786,186

FIVE YEAR AVERAGE:

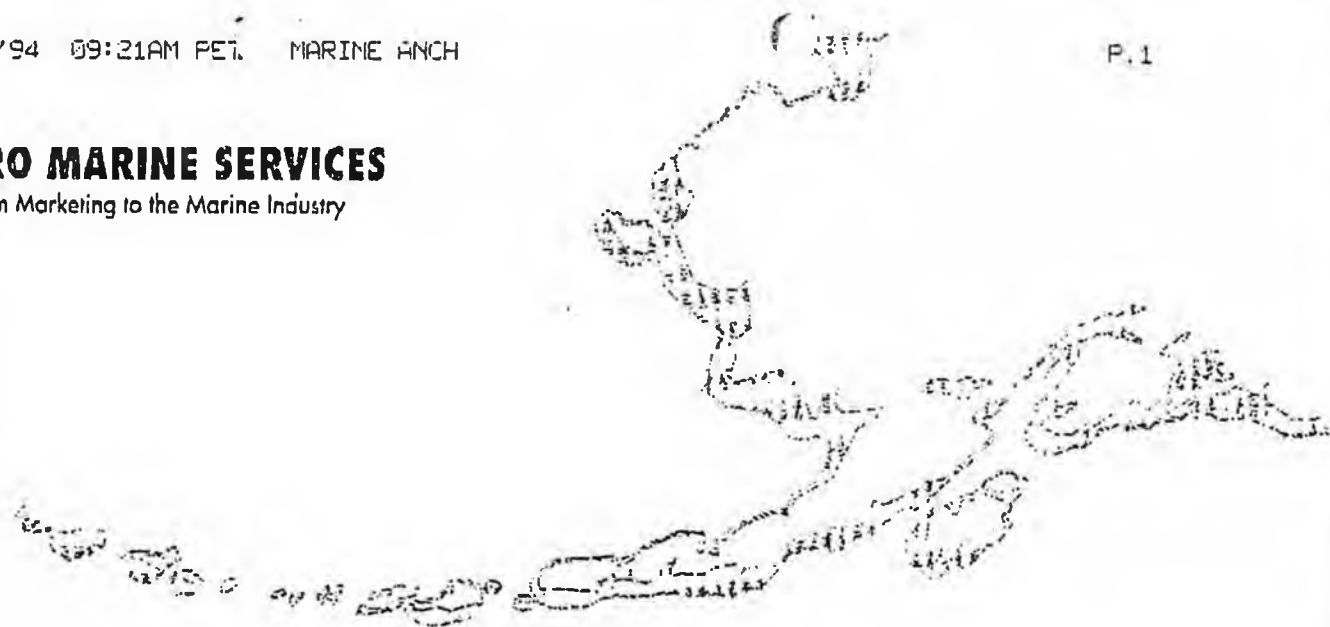
5,838,277 TOTAL GALLONS/YEAR (\$291,913 TAX/YEAR)
84,388 GALLONS/YEAR TO NON- TESORO AFFILIATED
CUSTOMERS

AVERAGE BUNKER FUEL CUSTOMERS
FIVE YEARS - TESORO ALASKA



PETRO MARINE SERVICES

Petroleum Marketing to the Marine Industry



THIS PACKET IS INFORMATION THAT SUPPORTS
HOUSE BILL 453
AND
SENATE BILL 327

THE NEW LEVY WILL REDUCE THE TAX RATE
ON BUNKER FUEL AND HELP MAKE THE PRICE OF
BUNKER FUEL IN SEWARD COMPETITIVE WITH CANADA

PORT OF SEWARD MARKET

THE SEWARD PROGRAM: IN THE SPRING OF 1993 PETRO MARINE INVESTED \$509,500 IN A PUMPING/INLINE BLEND SYSTEM TO SELL SHIPS BUNKERS IN SEWARD. PETRO MARINE ESTABLISHED THIS FIRST OF ITS KIND FACILITY IN ALASKA AFTER PRINCESS CRUISE SIGNED A THREE YEAR CONTRACT TO BUY A SPECIFIED MINIMUM VOLUME. PRINCESS NEEDED BUNKERS FOR VESSEL STABILITY AND PETRO MARINE NEEDED A MINIMUM QUANTITY FOR ITS RETURN ON INVESTMENT. DURING THE 1993 SUMMER SEASON PETRO MARINE SOLD 4,106,876 GALLONS OF BUNKERS AND PAID \$205,343.80 MARINE TAX.

THE 1994 SEASON: THE FOUR MAJOR CRUISE LINES HAVE THE FOLLOWING REQUIREMNET EACH SUMMER SEASON. (ABOUT ONE HALF OF THE PRINCESS AND HOLLAND FLEET GO TO GLACIER BAY AND THEN RETURN SOUTH)

CRUISE LINE	SUMMER BUNKER CONSUMPTION	
	TONS	GALLONS
PRINCESS CRUISE	55,855	15,680,000 (PER LETTER)
HOLLAND AMERICA	55,000	15,070,000 (PER MEETING)
CROWN	6,030	1,680,000 (PER MEETING)
REGENCY	9,720	2,680,000 (PER LETTER)
	-----	-----
	126,605	35,110,000
	=====	=====

SEWARD POTENTIAL VOLUME: OF THE 94 SAILINGS INTO SEWARD, 64 ARE BY THE ABOVE FOUR LINES. IF THE MOTOR FUEL TAX WAS REDUCED FROM 5 CENT PER GALLON TO 1.5 CENT PER GALLON, PETRO MARINE REALISTICALLY EXPECTS TO SELL IN EXCESS OF 12,000,000 GALLONS OF SHIPS BUNKER IN SEWARD DURING A SUMMER CRUISE SEASON. (NOTE: THE REDUCED TAX WOULD ONLY BE ON THE RESIDUAL PORTION (92%) OF THE BUNKER FUEL AND THE FULL 5 CENTS PER GALLON ON THE DIESEL. COMBINED TAX RATE WOULD BE 1.78 CENTS PER GALLON)

CRUISE LINE	IFO 380	GALLONS
	TONS	
PRINCESS CRUISE	37,800	10,357,200 (CONTRACT MAXIMUM)
HOLLAND AMERICA	4,095	1,122,000 (ONE SHIP IN SEWARD)
CROWN	2,700	740,000 (ONE SHIP)
REGENCY	4,050	1,110,000 (TWO SHIPS)
	-----	-----
	48,645	13,329,200
	=====	=====

PETRO MARINE WOULD PAY APPROXIMATELY \$ 237,000.00 MARINE TAX TO THE STATE OF ALASKA IN 1994. (\$31,657.20 OVER 1993)

PETRO MARINE SERVICES

SEWARD TOTAL VOLUME: WHEN THE SEWARD BUNKER PRICE IS ESTABLISHED AS A COMPETITIVE PRICE, YOU CAN BUILD A CASE THAT PETRO MARINE MAY BE ABLE TO ATTRACT ADDITIONAL VOLUME FROM THE FOUR MAJOR LINES AND OTHERS (IN OTHER WORDS BUNKER FOR THE ROUND TRIP). ONCE THE CRUISE INDUSTRY SEES SEWARD AS THEIR BUNKER PORT, THEN PETRO MARINE ALSO HAS AN OPPORTUNITY TO SELL STRAIGHT MARINE DIESEL AT THE FULL 5 CENT PER GALLON TAX (CURRENTLY PURCHASED IN CANADA). THE FULL POTENTIAL OF THE SEWARD SAILINGS (94) IS IN THE TABLE BELOW:

CRUISE LINE	IFO 380 TONS	MARINE DIESEL	GALLONS
PRINCESS CRUISE	37,800	NONE	10,357,200 (CONTRACT MAXIMUM)
HOLLAND AMERICA	16,380	1,260	4,875,000 (TWO SHIPS)
CROWN	5,400	630	1,673,000 (ONE SHIP)
REGENCY	8,100	1,620	2,717,000 (TWO SHIPS)
OTHER	7,000	3,520	3,000,000 (THREE SHIPS)
	74,600	7,030	22,622,200
	=====	=====	=====

PETRO MARINE WOULD PAY APPROXIMATELY \$472,600 MARINE TAX TO THE STATE OF ALASKA. (\$267,252.20 OVER 1993)

UPDATE TO MAY 1993 "PROPOSAL TO DEVELOP AN ALASKAN MARKET FOR BUNKER FUEL":

- TESORO INVESTED \$75,000 IN A TRUCK RACK LOADING SYSTEM FOR NO6 FUEL OIL
- PETRO MARINE INVESTED \$509,500 ON A NEW PUMPING/INLINE BLENDING SYSTEM TO THE ALASKA RAILROAD DOCK.
- PETRO MARINE EMPLOYEED 2 DOCK WATCH OPERATORS.
- WEAVER BROTHERS TRUCKING PURCHASED TWO TRUCKS AND EMPLOYEED 4 DRIVERS
- TOTAL SALES FOR 1993 WAS 4,106,876 GALLONS, 356 TRUCK LOADS
- THE AVERAGE PRICE DIFFERENCE BETWEEN SEWARD AND VANCOUVER FOR SHIP BUNKERS IN 1993 WAS 6.08 CENTS PER GALLON

IF PETRO MARINE SETS A 1994 SALES OBJECTIVE OF 13,000,000 GALLONS:

- PETRO MARINE WILL HIRE 4 DOCK WATCH OPERATORS AND A OPERATIONS SUPERVISOR
- TESORO WILL UPGRADE THE TRUCK LOADING RATE AT THE REFINERY RACK
- WEAVER WILL BUY 5 ADDITIONAL TRUCKS AND EMPLOYEE 10 ADDITIONAL DRIVERS

PETRO MARINE SERVICES

WHAT IS SHIPS BUNKERS?

BUNKER OIL: FUEL FOR TANKER, CARGO OR CRUISE SHIPS DERIVED FROM THE BLEND OF RESIDUAL FUEL OIL AND DISTILLATE OILS. THE RESULTING BLEND IS DESCRIBED BY ITS VISCOSITY. ON BOARD A SHIP, THE BLEND MUST BE PRE-HEATED AT THE BURNER TO REDUCE THE VISCOSITY FURTHER FOR PROPER ATOMIZATION.

RESIDUAL FUEL OIL: GENERALLY A BLACK, THICK, VISCOUS, SEMIFLUID MATERIAL. IT IS THE RESIDUE FROM CRUDE OIL AFTER THE LIGHT OILS, GASOLINE, NAPHTHA, KEROSENE, AND MID-DISTILLATES ARE EXTRACTED IN THE REFINING PROCESS. IT IS ALSO CALLED REDUCED CRUDE AND NO6 FUEL OIL. RESIDUAL FUEL OIL IS LIMITED TO HEAVY COMMERCIAL AND INDUSTRIAL USE WHERE SUFFICIENT HEAT IS AVAILABLE TO FLUIDIZE FOR PUMPING AND COMBUSTION.

VISCOSITY: THE VISCOUS CONDITION OF RESIDUAL FUEL OIL IS BROKEN DOWN BY USING MID-DISTILLATES (NO2 DIESEL) OR OTHER VISCOSITY BREAKERS. THE BLEND IS MEASURED BY A SPECIFIC STANDARD THAT THE REFINING AND SHIPPING INDUSTRY HAS FOUND TO BE THE OPTIMUM FOR EFFICIENT COMBUSTION AND OPERATION. THE COMMON MARINE BLENDS ARE INTERMEDIATE FUEL OIL (IFO) 180 AND IFO 380. THE NUMBERS REFER TO THE SECONDS IT TAKES THE BLEND TO PASS THROUGH A MEASURING DEVICE.

ALASKA: TESORO IS THE ONLY ALASKA REFINER THAT MUST MARKET RESIDUAL FUEL OIL SINCE ALL OTHERS RE-INJECT RESIDUE BACK INTO THE ALYESKA PIPELINE. THE ONLY APPLICATIONS FOR RESIDUAL FUEL OIL IN ALASKA ARE ASPHALT AND SHIPS BUNKERS. OUTSIDE ALASKA IT CAN BE USED FOR REFINERY FEED STOCK (COKING) BOILER FEED FOR ELECTRIC GENERATION AND INDUSTRIAL HEATING.

TAX ON BUNKER FUEL: THE SALE OF THIS TYPE OF MARINE FUEL CAN EASILY BE EFFECTED BY TAXATION. THE STATE OF CALIFORNIA WAS A MAJOR SUPPLIER OF SHIPS BUNKERS UNTIL THE STATE IMPOSED A 8.25% TAX. THE STATE HAS GONE FROM 3rd IN THE WORLD TO 22nd. BECAUSE OF THE CURRENT ALASKA TAX OF 5 CENTS PER GALLON, THIS FUEL IS ONLY SOLD IN ALASKA UNDER UNIQUE SITUATIONS. SEE THE ATTACHED ARTICLES

REASONS FOR BUYING BUNKERS IN ALASKA:

- VESSEL CHARTERED BY AN ALASKA COMPANY
- VESSEL REQUIRES BUNKER FOR RETURN VOYAGE (STABILITY)
- AN EMERGENCY
- ERROR AT DEPARTURE PORT

EXAMPLE OF TAX POLICY ON SHIPS BUNKER SALES

WESTCOAST: RESIDUAL FUEL OIL AND ANY BLENDED VARIETY SOLD AS SHIPS BUNKERS IS NOT SUBJECT TO ANY EXCISE TAX OUTSIDE OF ALASKA. CALIFORNIA IMPOSED A SALES TAX ON SHIPS BUNKERS AND THE MARKET "DRIED UP". THE STORY IS AN OUTSTANDING EXAMPLE OF HOW TAXING POLICY CAN IMPACT A MARKET.

SOURCE: OIL PRICE INFORMATION SERVICE (OPIS)

4 92-07-23 14:45:07 EDT

***MARINE FUEL BUSINESS 'DRYING UP' IN CALIFORNIA: JOC REPORTS

Today's Journal of Commerce, in a lead article, says that the marine fuel business in California is drying up.

In less than a year, sales of marine fuel in California have sunk from 4 million bbls monthly to 1 million bbls. The reason for the decline: the state sales tax on [bunker]-fuel purchases.

The 8.25 pct tax went into effect last July as a mechanism to help the state raise money to close a budget deficit. Instead, the tax has driven business away from California and is costing the state more than \$3 million in lost payroll taxes and other fees, according to a study commissioned by the Pacific Merchant Shipping Association.

Los Angeles once ranked with Rotterdam and Singapore as one of the world's biggest marine fuel ports, reports the JOC. It wouldn't make the top 20 today.

5 92-09-28 14:43:57 EDT

***CALIFORNIA REPEALS [BUNKER] FUEL TAX

California Gov. Pete Wilson approved the repeal of a marine fuel sales tax that nearly devastated Southern California's [bunker] market by driving away business, the Journal of Commerce reports in today's issue.

The tax "placed California businesses at a competitive disadvantage with businesses in other states," the governor said in a statement announcing the repeal.

The repeal will take effect January 1, 1993. The 8.25tax on [bunker] fuel was imposed a little more than a year ago, as part of an effort to raise money to close a huge state budget deficit.

This particular tax ended up costing California [bunker] fuel business, as ships bunkered in areas with no taxes. Los Angeles sunk from being one of the top three [bunker] markets in the country to not even being in the top 30, the Journal of Commerce reports.

THE CALIFORNIA 8.25% DROVE BUSINESS AWAY. WITH THE ALASKA RATE OF 13%, BUNKER SALES IN-STATE ARE SPECIAL CIRCUMSTANCES ONLY. (I.E WEATHER EMERGENCIES, BALLAST NEEDS, IN-HOUSE REQUIREMENT) THERE IS NO "MARKET" PRESENTLY BUT THERE COULD BE IF THE ALASKA MARINE TAX ON HEAVY SHIPS BUNKERS WERE REDUCE TO 1 CENT PER GALLON. IN FACT THERE IS A GOOD "CASE" FOR TAX REVENUE GOING UP IF THE TAX WERE REDUCED.

PETRO MARINE SERVICES

Petroleum Marketing to the Marine Industry

DATE: March 09, 1994
TO: Ray Gillespie
FROM: D.R. Lindsey *DL*
SUBJECT: Bunker Fuel Tax Amendment Statement

Good afternoon. My name is Dale Lindsey and I am the President of Harbor Enterprises, Inc., the corporate entity for our trade name affiliates, Petro Marine Services, Alaska Oil Sales and Shoreside Petroleum. We are one of the oldest petroleum marketing and distribution firms in Alaska and are headquartered in Seward.

With specific reference to pending Senate Bill No. 327 which, if enacted, will reduce the state motor fuel tax rate from \$0.05 (five cents) to \$0.015 (one and one half cents) per gallon on sales of marine residual fuel oil into passenger bearing cruise vessels, this proposed legislation corrects an unforeseen inequity that was created when the current Alaska Motor Fuel Tax Statute became law in 1972. Twenty two years ago there was no market for this heavy viscous black fuel which is a low end by-product derived from refining crude oil to produce diesel fuel, jet fuel, heating fuels and gasolines.

Tesoro Alaska Petroleum Company operates a refinery at Nikiski and is the only in-state producer of this particular product. Tesoro is also the only refinery operating in Alaska that does not benefit from being able to re-inject their left over residual oil back into the Trans-Alaska Pipeline system. Historically Tesoro has been at an economic disadvantage in that they have had to literally "dump" this residual product on primarily foreign markets at a price substantially less than their base crude cost. In addition to the financial hardship this has caused Tesoro one could legitimately assume the Alaskan consumer is subsidizing the disposition of this product through paying a higher price for distillate fuel and gasolines.

In assessing the potential market for 1994 and beyond, Jim Burns our Senior Vice President/Marketing believes that there may well be an opportunity to sell up to 20,000,000 gallons of this product to an increasing number of cruise line vessels that have committed to berthing at the Alaska Railroad Dock in Seward during the 120 day tourist season window.

Page Two
Bunker Fuel Tax Amendment Statement
D.R. Lindsey

In 1993 our marketing entity Petro Marine Services negotiated a 3-year "pilot" bunker supply agreement with Princess Lines. Of consequence, a significant portion of our capital dollars were allocated to design and construct modifications at the Seward Plant in order to deliver this difficult to handle fuel and to accommodate the Princess vessels. By virtue of our first year's performance, I am pleased to convey that our company has developed a good, mutually beneficial relationship with Princess Lines. And although the 5 cent per gallon state tax made our selling price proportionally higher than that of the competing Canadian Port of Vancouver, our service was deemed excellent and our product quality superior. However, the future of our contract with Princess along with securing commitments from other cruise line companies is subject to the economic requirement of our being reasonably price competitive. Accordingly, for us to further develop and promote this business we need a more realistic tax rate to enable us to compete with Vancouver and other West Coast ports.

I, therefore, respectfully urge you to correct the tax inequity created 22 years ago by reducing the tax applicable only to this low value "gunk" fuel. Your support for this endeavor will enable Petro Marine Services to develop the residual marine bunker business into a win-win situation that will accrue future benefits to the cruise industry, Tesoro, Petro Marine and to the State of Alaska.

I thank you for your time and I sincerely appreciate your consideration of this request.

PETRO MARINE SERVICES

Petroleum Marketing to the Marine Industry

RESIDUAL FUEL SPECIFICATIONS: THE DEFINITION IN HOUSE BILL 453 AND SENATE BILL 327 INTENDS TO REFER TO ANY SHIPS BUNKER THAT IS A BLEND USING RESIDUAL FUEL OIL. UNFORTUNATELY LIKE A CASTLE, ONE MANS BUNKER OIL IS NOT THE SAME AS ANOTHER. THERE ARE MORE THAN ONE SET OF STANDARDS FOR ENGINE OILS:

- INTERNATIONAL COUNCIL ON COMBUSTION ENGINES (CIMAC)
- BRITISH STANDARDS INSTITUTE (BSI)
- INTERNATIONAL STANDARDS ORGANIZATION (ISO)

ONE OF MANY STANDARDS GENERALLY USED TO GRADE FUELS IS ITS VISCOSITY. ONE OF THE INDUSTRY GRADING STANDARDS IS KINEMATIC VISCOSITY MEASURED IN WHAT IS CALLED CENTISTOKES (CST). THIS IS A MEASURE OF THE NUMBER OF SECONDS IT TAKES FOR A FUEL TO PASS THROUGH A STANDARD DEVICE UNDER CONTROLLED TEMPERATURES.

THE TYPE OF FUELS THAT WOULD BE COVERED BY THIS NEW LEVY ARE FUELS THAT ARE THE RESULT OF BLENDING RESIDUAL FUEL OIL WITH A DIESEL OR OTHER VISCOSITY BREAKER. THE RESULTING FUEL WILL ALWAYS HAVE A VISCOSITY GREATER THAN NO1 OR NO2 DIESEL. THE FOLLOWING ARE THE GENERALLY ACCEPTED INTERNATIONAL STANDARDS FOR THE FUELS WE ARE TALKING ABOUT.

PRODUCT	KINEMATIC VIS IN CST		
	MIN	MAX	
NO2 DIESEL (CALLED MARINE GAS OIL IN THE MARINE FIELD)	1.9	4.1	SOLD IN ALASKA AS HEATING FUEL, MARINE DIESEL
NO1 DIESEL	1.3	2.4	SOLD IN ALASKA AS HEATING FUEL
MARINE FUELS GRADE DMB	2.5	11	CALLED MARINE GASOIL IN MARINE FIELD
DMC	-	14	
RMA-10	6.0	10	
RML-55	-	55	
GAS TURBINE FUEL OILS 3-GT 4-GT			
FUEL OILS GRADE NO. 4	5.5	24	SOMETIMES CALLED HAGO
X FUEL OILS GRADE NO. 5	58	168	
X FUEL OILS GRADE NO. 6	92	-	CALLED NO6, RESIDUAL FUEL

THE SHIPS BUNKERS THAT PETRO MARINE SELLS IN SEWARD ARE SOLD ON VISCOSITY RATING. THE TABLE BELOW SHOWS THE AMOUNT OF NO2 DIESEL BLENDED WITH RESIDUAL FUEL OIL TO ACHIEVE REQUESTED VISCOSITY.

REQUESTED SHIP BUNKER	% OF DIESEL
100 CST	23
160 CST	19
380 CST	8
420 CST	7
900 CST	0

PETRO MARINE SERVICES

TESORO BUNKER FUEL SALES
FIVE YEARS (1989 - 1993)

◆ ◆ GALLONS ◆ ◆

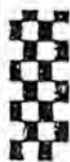
<u>YEAR</u>	<u>TESORO SHIPS</u>	<u>OTHER SALES</u>	<u>TOTAL</u>
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84,388 GALLONS/YEAR TO NON- TESORO AFFILLIATED
CUSTOMERS

AVERAGE BUNKER FUEL CUSTOMERS
FIVE YEARS - TESORO ALASKA





03 MAR 01 '94 01:27PM PT

MARINE ANCH

REGENCY CRUISES

P.171001/001



March 1, 1994

Mr. James S. Burns
PETRO MARINE SERVICES
3111 "C" Street
Suite 500
Anchorage, AK 99503

Dear Mr. Burns:

As I indicated during our meeting last month, Regency will deploy two vessels in Alaska during the summer of 94 and I am please to tell you we will add a third ship in 1995.

While at present, bunkering takes place in Vancouver every two weeks, we are very much interested in your proposal to bunker in Seward.

However we must tell you that in order to stay competitive with Vancouver's price, serious consideration must be given to reduce the current "motor fuel tax" to a more realistic figure.

To give you an indication of our bunkering needs, on an average the Regent Sea bunkers 450 M/T of IFO 180 and 150 M/T of MDO, the Regent Star 450 M/T of IFO 100 and 130 M/T of MDO every two weeks.

We look forward to doing business with you hopefully in the very near future.

Sincerely,
REGENCY CRUISES

Andrew K. Horton
Manager - Port Operations

AKH/GG

PRINCESS CRUISES 

FSF

FINAL
cc Keith Dawson
FBI

01110
Santa Skina
Houlard
Los Angeles
California
94017 4140
Corporate
310-334-1776
Telex
PRC 182372
Telefax
310-277-5175

February 28, 1994
Ref: SAN/cjt #1612

Mr. Jim Burns
Petro Marine
3111 C Suite 500
Anchorage, Alaska 99503

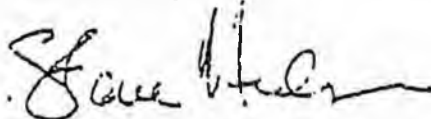
Dear Jim,

Princess Cruises operates 6 cruise vessels in the Alaska cruise trade from June through September each year. Five of these vessels are based in Vancouver and one in San Francisco. Of the 5 Vancouver based vessels, 3 operate 7 day cruises across the Gulf of Alaska between Vancouver and Seward and 2 operate 7 day cruises round trip from Vancouver through the inside passage of Alaska. That San Francisco based vessel operates 10 day round trip cruises to the inside passage of Alaska. Alaska ports of call include Ketchikan, Juneau, Skagway, Sitka and Seward.

We purchase the fuel oil for our ships based upon quality and price. Fuel oil purchased in Vancouver is essentially the same quality as that available in San Francisco, Seattle and Seward. The price differential, due to the Alaska state motor fuel tax is, however significant. The tax of \$0.05 per gallon, which is approximately equal to \$13.65 per ton, makes it prohibitive to purchase more than the minimum required in Seward to return to Vancouver. Our total requirements for the 1994 Alaska cruises season will be approximately 37,855 tons (15,680,000 gallons) for the 6 vessels. Of this amount we anticipate purchasing approximately 9,450 tons (2,561,000 gallons) in Seward.

We strongly support the proposal to reduce the Alaska state motor fuel tax to \$0.01 per gallon. This would make the cost of fuel oil in Alaska competitive with that in Vancouver. This would encourage greater purchase of fuel oil in Alaska.

Very truly yours,



Stephen A. Nielson



Holland America Line
Westours Inc.

Mr. James S. BURNS
Petro Marine Services
3111 'C' Street Suite 500
Anchorage AK, 99503

To fax : (907) 561-6500

Seattle February 16 1994

Dear Mr. Burns

It was a pleasure meeting you Wednesday for what turned out to be a very interesting discussion. You informed me that you are currently working with others in the Marine Industry to have legislation introduced that would reduce the current tax on marine fuel in Alaska from 5 cents per gallon to 1 cent. If successful, this would immediately reduce the price for Intermediate Bunker fuel with approximately \$ 10.00 per Metric Ton and this would allow Seward and other Alaskan ports to offer shipowners an additional or alternative bunker choice on the U.S. West Coast and British Columbia.

It is with this possibility in mind, that I express my appreciation and support for your continued efforts in this matter, which in my opinion will greatly benefit not only the Marine Industry but increasingly so, the people and the state of Alaska.

Very truly yours

Captain Willem A. KOOPMAN
Director Marine Operations WSC
HOLLAND-AMERICA LINE-WESTOURS Inc.

c.c. D. Grausz

KENT DAWSON COMPANY

P.O. Box 20790
Juneau, Alaska 99802
Phone: (907) 463-2533
FAX: (907) 463-3922

March 15, 1994

The Honorable Bill Hudson
Chair, House Labor & Commerce
Committee
State Capitol
Juneau, Alaska 99801-1182

Dear Mr. Chairman:

re: HB 453

On behalf of Princess Cruises and Princess Tours I have been asked to convey the following--quoting from a February 28, 1994, letter to Mr. Jim Burns of Petro Marine, and signed by Stephen A. Nielsen of Princess Cruises, which I have attached:

"Princess Cruises operates 6 cruise vessels in the Alaska cruise trade from June through September each year. Five of these vessels are based in Vancouver and one in San Francisco. Of the 5 Vancouver based vessels, 3 operate 7 day cruises across the Gulf of Alaska between Vancouver and Seward and 2 operate 7 day cruises round trip from Vancouver through the inside passage of Alaska. Alaska ports of call include Ketchikan, Juneau, Skagway, Sitka and Seward.

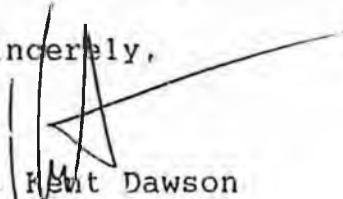
"We purchase the fuel oil for our ships based upon quality and price. Fuel oil purchased in Vancouver is essentially the same quality as that available in San Francisco, Seattle and Seward. The price differential, due to the Alaska state motor fuel tax is, however significant. The tax of \$0.05 per gallon, which is approximately equal to \$13.65 per ton, makes it prohibitive to purchase more than the minimum required in Seward to return to Vancouver. Our total requirements for the 1994 Alaska cruises season will be approximately 57,855 tons (15,680,000 gallons) for the 6 vessels. Of this amount we anticipate purchasing approximately 9,450 tons (2,561,000 gallons) in Seward.

"We strongly support the proposal to reduce the Alaska state motor fuel tax to \$0.01 per gallon. This would make the cost of fuel oil in Alaska competitive with that in Vancouver. This would encourage greater purchase of fuel oil in Alaska."

March 15, 1994

at one third (1/3) of our fuel requirements for the
at Seward if the price and quality are competitive
r, B.C. We can only say this for the Seward ships as
e only Alaska port with bunkering facilities.

Sincerely,


V. Kent Dawson

Attachment

CORRECTION

**THIS DOCUMENT
HAS BEEN REPHOTOGRAPHED
TO ASSURE LEGIBILITY**

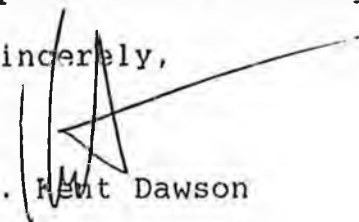
The Honorable Bill Hudson

- 2 -

March 15, 1994

purchase at least one third (1/3) of our fuel requirements for the ships calling at Seward if the price and quality are competitive with Vancouver, B.C. We can only say this for the Seward ships as Seward is the only Alaska port with bunkering facilities.

Sincerely,


V. Kent Dawson

Attachment